

SUMMARIZED
RECORD OF TRIAL
(and accompanying papers)

Gary P. Pittman
(Name Last, First, Middle Initial)

of
(b)(6)
(Social Security Number)

Sergeant
(Rank)

HqBn, 1st MarDiv
(Unit Command Name)

USMC
(Branch of Service)

Camp Pendleton, CA
(Station or Ship)

By

GENERAL **COURT-MARTIAL**

Convened by

Commanding General
(Title of Convening Authority)

Marine Corps Base
(Unit/Command of Convening Authority)

Tried at

Camp Pendleton, California,
(Place or Places of Trial)

on

29 Apr; 28 Jun; 8, 28
Jul; 9, 17, 23, 27 of 1981
Aug, 1-3 Sept 2004

ACTION OF JUDGE ADVOCATE OR GENERAL COURT-MARTIAL CONVENING AUTHORITY(SPCM)/JAG(GCM)
RCM 1111 and 1112, MCM, 1984)

UNIT COMMAND NAME	LOCATION OF JUDGE ADVOCATE OR GENERAL COURT MARTIAL CONVENING AUTHORITY JAG	DATE RECORD RECEIVED
ACTION	DATE	REMARKS
FINAL DISPOSITION: Findings and sentence, as approved by convening authority, correct in law and fact; to file		
OR Findings and sentence, as modified or corrected (see remarks), correct in law and fact; to file		
Acquittal or sentence set aside (see remarks), to file		
COPIES OF CMO DISPOSED OF IN ACCORDANCE WITH DEPARTMENT REGULATIONS		
JUDGE ADVOCATE OR LAW SPECIALIST		
SIGNATURE	RANK	DATE SIGNED

Vol IV of VII

Front Cover

TC: Yes, sir. The government calls Sergeant (b)(6) to the stand.

(b)(6) Sergeant, was called as a witness by the government, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the government:

Q. Please state your full name.

A. (b)(6)

Q. Okay. Spell the last name.

A. (b)(6)

Q. And you are currently a sergeant in the United States Marine Corps?

A. Yes, sir.

Q. Current unit please?

A. CI/HU Company, 2d Intelligence battalion.

Q. Okay. I -- are you -- you were involved in Operation Iraqi freedom. Correct?

A. Yes, sir.

Q. Were you in Iraq on 3 June 2003?

A. Yes, sir.

Q. On that day, were you involved in a capture of a

(b)(6)
A. Yes, sir.

Q. Please describe your involvement in that capture?

A. Through a source we learned that (b)(6) his whereabouts, so with a platoon from Weapons Company, 2/25, myself, Staff Sergeant (b)(6) and our interpreter, we went to his residence, and captured him.

Q. During this capture, did you observe any rough treatment of (b)(6)?

A. No, sir.

Q. Describe the capture, if you could, in detail starting with what you observed?

A. Um, when we got to where his residence was, he was outside, he saw us, started to walk away through the

fields. Myself, my interpreter, and Marines from 2/25, Weapons Company, hollered for him to stop. He did and walked back to us. We searched him for any weapons, he didn't have any weapons on him so at that time, we took him into custody.

IO: Let me interrupt you. And I apologize for this, this may have been done, but for some reason, I didn't make -- was the sergeant sworn in?

TC: Yes, sir.

IO: Okay. Thank you.

Questions by the government:

Q. Okay. When you say he was taken into custody, what do you mean, "taken into custody"?

A. He was flexycuffed and put into our vehicle to be brought back to Whitehorse.

Q. Did he put up any resistance.

A. No, sir.

Q. Did he happen to be hit or struck in any way?

A. No, sir.

Q. Did you observe any Marines hitting or striking him?

A. No, sir.

Q. Um, how would you describe his physical condition at the time of the capture?

A. Fine.

Q. Define?

A. He -- some were over weight, but seemed like most people in the area, more well-to-do, clean wearing shoes. He had a destasha, the white gown-type thing on. Um, didn't seem to be favoring anything. He was at a pretty slow jog trying to get away, but then he walked back fine.

Q. Okay. Um, during the -- were there any other individuals as a part of this patrol. I guess, that was captured on that day other than (b)(6). Was there other individuals linked to (b)(6) that were captured?

A. Yes, sir, there were two brothers.

Q. Okay. The (b)(6) ?
A. If that's their names, then, yes, sir.

Q. Okay. All right. But you didn't know what their names were?
A. No, sir.

Q. All right. But there were two brothers that were captured with (b)(6) ?
A. Yes, sir.

Q. And what was their link to (b)(6) ?
A. I'm not sure if I can get into that, sir.

Q. Well. I mean, it's already come out in the 32 that (b)(6) was thought to be tied to the ambush of the 507th maintenance Battalion; is that correct?
A. Yes, sir.

Q. Okay. And there was a rifle that was seized in that capture; is that correct?
A. Yes, sir.

Q. Okay. That rifle belonged to one of the soldiers from the 507th?
A. Yes, sir.

Q. And these (b)(6) brothers where in the possession of the rifle?
A. Yes, sir.

Q. And (b)(6) was the one who was thought to have sold the rifle to them?
A. Yes, sir.

[END OF PAGE]

Q. Um, what time of the day was this on the 3rd?
A. I believe we linked up with the platoon from 2/25 around 1500. It was about an hour to an hour-and-a-half drive out of the city. It was in the stix[ph], pretty far. So 1630, around that time was when we got him. It was starting to get dark. After we got him, the two brothers went back to the rally point, it was dark. The Marines from Weapons 2/25 -- because being so far out, we didn't have radio contact, and we had -- for lack of a better term, a curfew to be back to check in with our OIC. It was passed that time so the Weapons Company Marines agreed to take him --(b)(6) and the two brothers to Whitehorse, and Staff sergeant (b)(6) our interpreter, and myself went straight back to the compound.

Q. Okay. Which compound are you talking about?
A. The one in Nasariyah, the Museum Compound where the Marines from Weapons Company and ourselves stayed.

Q. Okay. So not at Whitehorse?
A. No, sir.

Q. When was the last time you saw (b)(6) on the 3rd of June?
A. At the rally point. He was in our vehicle. We put him in the vehicle from one of the Weapons 2/25. Around 1730, 1800, it was dark.

Q. Okay. And what was his condition at that time, could you see?
A. He seemed fine. He was flexycuffed, but besides that he was fine.

Q. Okay. Um, when was the next time you saw (b)(6)?
A. Excuse me. Approximately 0830 the next day. Staff Sergeant (b)(6) and myself went to do an initial screening with him.

Q. Okay. That was on 4 June. Correct?
A. Yes, sir.

Q. Where was this interview conducted?
A. At Camp Whitehorse.

Q. Okay. Right there at the detention facility?
A. Yes, sir.

- Q. All right. During the interview that you had with (b)(6), how did he appear physically?
- A. He appeared all right. It was a little bit warmer than Texas, but everybody was sweating pretty good. When we brought him in the old latrine -- old crapper that we used for interviews, we let him sit down, he was sweating, and so were we. Besides that, a little tired, but otherwise fine.
- Q. Did he -- did you hear him speaking?
- A. Yes, sir.
- Q. Did it seem like he was having any trouble speaking?
- A. I wouldn't say he had trouble speaking, he just -- when we would ask him questions through the interpreter, some of them he would answer, and some he wouldn't. I think it was by his own choice, not because he couldn't.
- Q. Did you notice or observe any stress that he was having with his throat?
- A. Not at all, sir.
- Q. During that interview, who was present?
- A. Myself, Staff Sergeant (b)(6), and our interpreter, Lance Corporal (b)(6).
- Q. During that interview, did any of you hit, strike, punch (b)(6) in any way?
- A. Not at all, sir.
- Q. After this interview where (b)(6) did you have any discussions with anyone from 2/25 Marines that were at the detention facility about (b)(6) significance?
- A. Um, they did know that this was the reason why he was captured. We didn't -- it turned out the next day -- or later that day. I'm not sure. When the word got up higher that he had been captured, we were told not to speak to them anymore. That the Army would be sending people down to speak with him.

Besides that, the guard force usually -- here's an example. Whitehorse wasn't only used for EPW's, but a lot of criminal things because the Iraqi police force was there trying to get back together. And so we would go out there quite a bit and screen detainees. Some of them as simple as, they were farmers and had a weapon in the car because of lootings and stuff like that. They

get rolled up at a check point. Once we would go and determine we would make the recommendation that they are not really a threat, they are not against the U.S., they are just here -- they had a weapon because they have to protect their farms so -- or in the other cases, yes, they were going to go onto the next detention facility. So in this case, that's when they would be separated eastbound more so by the guard force. Everyone was treated well that I always saw.

Q. Okay. let's go back to that question. After your interview with (b)(6) did you tell anybody from the folks that were running this detention facility what you believed his significance to be?

A. Um, not that I recall, sir.

Q. Okay. Um, did you think he was an important intelligent source at that point?

A. Yes, sir.

Q. Did you think that he had -- was a potential source of military intelligence?

A. Well, for the purpose of force protection, for all the Marines that were in Nasariyah, I think he was an important force in that matter, militarily, no.

Q. Okay. What do you mean force protection?

A. Any ambushes or attacks that may have been planned or what have you, against the Marines.

Q. So like counter [inaudible], that type of thing?

A. Some what, yes, sir, more harassing, gunfire.

Q. Were the Marines still being subject to that type of harassing fire at that time as of June 3, 2003?

A. Yes, sir.

Q. I'm sorry. June 4, 2003?

A. Yes, sir. there was always a threat.

Q. Um, now, let's talk about -- shift gears a little bit. Have you ever heard of a technique called 50/10 or 45/15, where you're -- where potentially a detainee is required to stand for 15 minutes every hour and then allowed to sit for ten minutes and stand for 45 and then sit for 15 in order to wear them down mentally to make them more cooperative for interrogations?

A. Yes, sir, I've heard of it.

Q. Where have you heard of it?
A. From an NCIS agent. Right after this happened or shortly there after --

Q. After what happened?
A. (b)(6) passed on. Staff Sergeant (b)(6) Lance Corporal (b)(6) ph], and myself were flown to Kuwait for three days to speak with NCIS agents, and that's the first time I actually heard of that rule or that process.

Q. Had you ever suggested that technique to any of the guards at Camp Whitehorse?
A. No, sir.

Q. Why not?
A. I had never heard of it before.

Q. Okay. How about sleep depravation?
A. No, sir.

Q. You never suggested that to any of the guards?
A. No, sir.

Q. Okay. Why not?
A. Not what we do. There's really, it's not a technique that I would ever use. I've never been taught to use it nor have I ever suggested it.

Q. Um, have you ever -- was there a situation dealing with the detention facility of Whitehorse that you observed, in which, you thought guards had gotten overly aggressive with a detainee?
A. Never, sir.

Q. Do you remember an incident with a gentlemen that had a knife in his mouth -- or razor blade?
A. Razor blade.

Q. Could you briefly describe that circumstance?
A. Um, we had just gotten done screening some detainees. We were getting ready to leave. They were bringing some more in that we were going to speak with the next day. Whenever they could get -- and this is as far as I know. Whenever they would get new detainees, they would always strip search them, which is by the book, it's exactly what you should do. So I believe it was Segreant-Pittman, Lance Corporal (b)(6) they were having

this detainee, he was taking off his clothes, and if I'm not mistaken, Lance Corporal (b)(6) had him open his mouth, and I heard him say, "He's got a razor blade in there." I turned around and he was on the ground.

Q. Who was on the ground?

A. The detainee.

Q. Okay.

A. They had brought him to the ground with the appropriate amount of force, from what I saw. He spit the razor blade out, and that was it, then they got him back up and they let him get dressed.

Q. Just want to make sure I understand. So there was an individual that had an actual razor blade in their mouth?

A. Correct.

Q. And the only force that was used on that individual which is taking the person to the ground and removing the razor blade?

A. As far as I know, yes, sir.

Q. Did you see anybody punch that person in the ribs?

A. No, sir.

Q. Or kick them in the chest?

A. No, sir.

Q. If you would have saw or seen someone punching that person in the ribs with a great deal of force or kicking them in the ribs, would you have thought that was too much force to be used in that situation?

A. If I would have seen it, yes, sir.

Q. Okay. Had there been -- when you were there at the detention facility, had there been other individuals that had been captured that had been potentially linked to the 507th maintenance battalion ambush?

A. Not that I'm aware of.

Q. None that you interviewed?

A. No, sir.

- Q. And how long was it that you had been there conducting these interviews -- I mean, what period? Months? Weeks?
- A. We got back to Nasariyah the second or third week in April. Um, so probably the third to last week in April through the end of July.
- Q. During that period of time, these are the only three that were actually directly linked to that ambush that you captured?
- A. Um --
- Q. That went to Whitehorse?
- A. That I'm aware of, and on that note the two bothers, it was never decided whether they had anything to do with the 507th or not, sir.
- Q. Okay. I guess, my question is, during that period of time, that you were conducting interviews of detainees at Whitehorse, those three, (b)(6) and the two (b)(6) (b)(6), or those two bothers, were the only three individuals that had ever been detained and kept at Whitehorse where you conducted interviews that were linked to that ambush at 507th?
- A. To my knowledge, yes, sir.
- TC: All right. Thank you. That's all I have, sir.
- IO: Cross?

CROSS-EXAMINATION

Questions by the military defense counsel (Capt Studenka):

- Q. The sight of the capture of (b)(6) house, you said it was in the "stix[ph]," I think was the word you used?
- A. Yes, sir.
- Q. Very rural area?
- A. Yes, sir.
- Q. Fair to say it was poverty stricken?
- A. Yes, sir.

Q. And the area where you actually captured -- you actually grabbed or were able to get him in flexycuffs, (b)(6) that was in what you described to me in the past as like rice patties, like Vietnam accept --

A. Yes, sir.

Q. -- in a marshy area?

A. Marshy would be the best way to describe it, sir.

Q. And that was where he was walking to basically evade you guys before you captured him?

A. Yes, sir.

Q. The interrogation the next day, 0800, 0830, and lasted about --

A. An hour, hour and a half.

Q. Hour, hour and a half. Um, and you personally didn't see (b)(6) brought from the holding pen to your facility where you were going to do the interrogation. Correct?

A. No, sir.

Q. He was actually brought to you, delivered basically?

A. Yes, sir.

Q. And during the course of the interrogation he was sitting the entire time?

A. Yes, sir.

Q. He never stood up? He never asked you to stand up?

A. No, sir.

Q. He was clothed with the same robe, and I can't say the word frankly?

A. Destasho[sic], yes, sir.

Q. Okay. And at no time did you ask him to take that off or anything like that?

A. No, sir.

Q. And you said everybody was sweating, but he was also sweating at the time?

A. Yes, sir.

Q. And did he appear nervous to you?

A. I don't know -- nervous, I don't think so, sir, just --

- Q. Uncertain?
- A. Maybe uncertain. There was some questions that he would answer, and some he just didn't want to.
- Q. Let's talk about that for a second. It didn't seem to you that he was not answering questions, specific information that he didn't want to give you, did he? I mean, that's a bad -- let me ask that again. It didn't seem that he was deciding which type of questions he didn't want to answer, did it?
- A. Yes, sir, it did.
- Q. It did? It seemed like he was trying to withhold particular information?
- A. Absolutely.
- Q. It wasn't just random questions that he wouldn't answer at some time?
- A. No, sir.
- Q. I guess before we talked, I asked you if there was rhyme or reason to the question, he would or would not answer. He said there didn't appear to be. Is that not a fair statement?
- A. Um, there are certain --
- Q. I understand you can't get into specifics of --
- A. Certain questions that he would answer that would implicate him in the things we think he did, and then at the same time questions that are linked right along with that he'd answer "A", "A", "C", but he wouldn't answer B. So maybe in that case, yeah, there are some that -- if he had already said A, why wouldn't he say B because they are directly correlate today each other.
- Q. Okay. And I guess what I'm driving at here is that if he went in there with the mindset "I'm not going to provide them with any information about a particular topic," it would make sense that the questions he was asked about that topic he wouldn't ask them. Correct?
- A. Yes, sir.

Q. But in the interview that you had with (b)(6) it seemed that he would provide you with some information, that you think he would be guarding but not provide you other information that you think you wouldn't guard. Right?

A. Exactly.

Q. So in a way there was no rhyme or reason to the questions he would or wouldn't answer?

A. At times, yes, sir.

Q. And also fair to say that he wasn't answering all of your questions?

A. Correct, sir.

Q. He didn't eat anything during the course of this interrogation?

A. No, sir.

Q. But he did ask you guys if he could drink some water at one point, did he not?

A. That's correct sir.

Q. And when you actually offered the water -- offered to hand him the water the first time. Correct?

A. I was going to -- I had the cup in my hand and I was going to give him a drink, yes, sir.

Q. And he wouldn't take that?

A. Yes, sir.

Q. He refused to take water from you. Correct?

A. Yes, sir.

Q. And the only way he would drink that water is if it came from the hand of the interpreter, who had been talking with him. Correct?

A. This's correct, sir.

Q. And the amount of water, small amount relatively -- been described as a mouth full, is that fair?

A. What we would do, we had the water bottles and we would cut the tops off, so you'd have a cup that would maybe hold 8 ounces, so I'd say maybe 45 ounces of water.

Q. Okay. So he consumed 4 or 5 ounces during the course of the interrogation?

A. Yes, sir.

Q. Did it appear to you as he's sitting during the course of this interview that he was favoring one side?
A. Um, that I do not recall.

Q. You don't remember if he was favoring one side or another?
A. No, sir, I don't.

Q. You recall that his eyes were droopy during the course of this interview?
A. A little bit, yes, sir.

Q. Like, basically not open and alert the entire time?
A. Um, he just seemed a little tired actually.

Q. So his eyes were all the way over?
A. Yes, sir.

Q. And he didn't seem very alert?
A. Not at all, sir, Captain Studenka.

DC: No further questions, sir.

CROSS-EXAMINATION

Questions by the military defense counsel (Capt Jasper):

Q. Good morning, sir, how are you doing?
A. Good, sir.

Q. It was quite obvious to you that (b)(6) didn't really like Americans very much, wasn't it?
A. Um --

Q. Well --
A. I guess --

Q. Do you remember talking to some special agents on this case around June 6th?
A. NCIS, I think, the first time I spoke with anyone from NCIS they came down to Camp Whitehorse and that's where they spoke with us, and it was on or around that time, I think a few days after.

Q. And you remember telling them that (b)(6) - your describing the mannerisms of (b)(6) and your interactions with him. Right?

A. Possibly, sir, yeah.

Q. Let --

A. It was a real quick interview and quite a little while ago. So --

Q. During the course of the interview, some of the things that wanted to pursue, was your actions with (b)(6) and what your opinions were of (b)(6) condition. Right?

A. Possibly, sir. I remember it was a warrant officer and a staff Sergeant that were working for NCIS that we spoke with, again, it was very brief.

Q. Okay. But you do remember your interaction with (b)(6)?

A. Yes, sir.

Q. And it was obvious that he was being uncooperative on certain questions?

A. Yes, sir.

Q. Questions that were important for you -- information that you wanted to gather from him?

A. Yes, sir.

Q. It was obvious that he didn't want to go there in that line of questioning, he didn't want to provide that information to you?

A. Again, he would. he wouldn't. At this time that we captured (b)(6) it was still unclear all the -- everything that took place with the attack on the 507th, so it was a pretty big deal for the Army because they didn't know if there had been tortures or rapes or murders or what have you. So that's why he was a little bit more important than the rest.

Q. (b)(6) was a good catch for you, wasn't he?

A. I --

Q. You got information from your sources that he possibly was related to the 507th Maintenance Regiment, involved, and, Jessica Lynch is a high profile person, don't you think?

A. Um, a little bit so, sir. But that's not the way I looked at it. He was still an active members in one of the groups that was very anti-U.S., and we were getting

information about possible attacks, getting ready to take place on Marines in Nasariyah. And during this point in the OIF, our main focus was force protection for the Marines in Nasariyah.

Q. So he was very much involved in the organization that was anti-American?

A. Yes, sir.

Q. All right. And do you remember talking to the agents and telling them that he was someone that did not like Americans?

A. I could have said it. I'm sure he doesn't like Americans. Possibly I'd say, Yes, sir. Do I remember specifically --

Q. All right. I'll move on to something else. You captured him on June 3rd at what time?

A. Approximately 1700.

Q. Okay. Why didn't you question him that night?

A. The reason we didn't question that night: One, we had to get back, like, I said before, but we had a drop dead time to be back. And we were already passed that time. Radio communications out there was not real good because of the distances that we had travel. At that point, it was our direction that we weren't out at night, we would be out during the day so we were supposed to be back, and there was no reason when we got back that what we had been doing. We would be out there first thing in the mornings and that's when we'd interview him.

Q. On other occasions when you captured people of interest to you, would you question them right when you capture them?

A. Um, well, this was a --

Q. Explain your system basically.

A. It is not our job to capture people. This was a little bit different of a situation that we were thrown on. I'm just trying to be careful of how I word this, sir.

Q. If you could just express what you expressed to me earlier about what concern you have?

A. Just pertaining to our MOS, sir, and our job, and to the Marine Corps Order. We're not supposed to release -- nothing is supposed to be released about our identities or how we do our job. Especially with the

media being present right now, sir. I know that this media has been briefed about what they can release and what they can't. I'm just --

IO: I understand, is it relevant, necessary material to your representation of Major Paulus to get into the methods and means of how they do these things?

DC: I believe it's relevant, sir. I don't want to jeopardize any type of classified information as Captain Francis has asserted. It's definitely relevant.

IO: All right. Well, then we may ask Mr --

TC: If we need this information down the road, I -- we don't want to make representation right now that we don't think it's relevant or anything like that. We're going the move on in this line of questioning Mr. Higgins was speaking.

IO: Okay. Do you understand their position, Captain Francis? Maybe something if it goes any further than an Article 32 that may become an issue that you'll have to deal with?

TC: Yes, sir. We talked about the facts and he notified me about that earlier today, and I told him if we enter a court-martial on any particular -- any of these cases, then that issue is going to definitely have to be addressed with the judge.

IO: All right. You're not waiving it?

CC (MR. HIGGINS): We want to move on off it.

DC: Captain Jasper, thank you very much.

IO: Lieutenant Folk?

DC (1STLT FOLK): Yes, sir.

CROSS-EXAMINATION

Questions by the military defense counsel 1stLt Folk):

Q. Sergeant, you said you didn't see (b)(6) process of bringing him from the detention facility to the HET Team facility. Right?

A. No, sir, we were inside.

Q. But you did get a chance to see him once again at your facility once he was there. Right?

A. Yes, sir.

Q. So you saw him?

IO: Hold on for a second. I'm confused by your terminology. When you say that the detention facility, the HET Team facility, you're talking about the building within the detention compound where the HET Team did their interviews?

DC: That's correct. As opposed to the holding cells.

IO: Okay. Thank you.

Questions by the military defense counsel (1stLt Folk):

Q. Um, you had a chance to see (b)(6) during the 60 to 90 minute interview?

A. Yes, sir.

Q. Okay. And you saw when he was seated wherever that seat was in your HET building. Right?

A. Yes, sir.

Q. You had a chance to see him get up when he left the building at the conclusion of your interview?

A. Yes, sir.

Q. He didn't appear to have any difficulty either seating himself or standing back up, did he?

A. Well, he was helped to sit and helped to stand because his hands were secured behind his back, but besides that, yes, sir.

Q. He wasn't moaning or groaning or making any noises that would indicate to you that hurts, to stop it?

A. No, sir.

Q. Now, your description of (b)(6) orientation, I guess, during the interview is that he appeared to tire. Right?

A. Yes, sir.

Q. Were you able to form an opinion based on what you saw of (b)(6) as to whether or not he understood the questions that your interpreter was asking?

A. I believe he understood very well. I also think he understood English to a certain extent.

Q. Why do you believe that?

A. When Staff Sergeant (b)(6) and I would talk to each other, or I'd say something -- there's at least one case where I would say my question to the interpreter and before he would even interpret it, (b)(6) would start to answer the question.

Q. Did (b)(6) make any representations in Arabic as to whether or not he understood English?

A. We -- we asked him if he spoke English, and he said "no" through the interpreter.

Q. But it's your belief based on --

A. That he understood at least some English, yes, sir.

Q. Would you say it's fair to characterize his behavior toward the members of the HET Team that morning that somewhat dishonest in that regard?

A. Um, in that regard, yes, sir. Yes, sir.

Q. At any point you described him as looking tired. You said, "eyelids were droopy" at one point. Did he ever appear to be under any kind of mental or physical condition that was causing that or, was it simply just physical reaction of not getting sleep, or what do you think?

A. Well, I've never been captured, but I'm sure that can't

be an easy way to get to sleep at night. Um, I don't know if he was kept up intentionally that night. Um, it's just what I saw him -- he just looked a little tired.

Q. And I may have asked you a bad question. Did he appear to be having any kind of physical or mental condition? Anything besides being tired that had -- was making him --

A. Not that I'm aware of, sir. No, sir, not that I saw.

Q. And you see a lot of people during the course of interviews. Right?

A. Yes, sir.

IO: Would you say he was basically normal by your observations?

A. There's not really a normal, sir.

Q. Did you see anything that caused you any concern that "Hey, that guy has a problem"?

A. No, sir.

Q. In your opinion, while you were at Camp Whitehorse, was it common, or did it ever occur, that detainees would be kept up prior, unless they kept up -- kept up over night so that they wouldn't sleep or had limited amounts of sleep prior to being interviewed by the HET Team?

A. No, that I'm aware of. No, sir.

Q. When did you arrive at Camp Whitehorse?

A. Well, um, I guess we didn't billet at Whitehorse. We were in the city, again --

Q. When did you start working there?

A. Again, late April, late -- third, or fourth week in April. And through the duration to when we left, which would be mid-July time frame.

Q. Was (b)(6) evaluated by any medical personal prior to the interview that you guys conducted, you, the Marines of the HET Team conducted on the morning of the 4th of June?

A. Yes, sir.

Q. And when did that take place?
A. I don't know the exact time, but it's common practice, and the guard force for 2/25, or at Whitehorse were always -- always did it. As soon as someone was checked in, as soon as they were searched, and then they were seen by medical personnel. And when we do an initial screening, that's one of the first four, five questions they're asked. A name, something like that. "Have you been seen by medical personnel?"

Q. Was that question posed to (b)(6)?
A. Yes, sir.

Q. And what was his response?
A. That he had.

Q. Did he indicate that he had any concerns with his medical condition at this point?
A. No, sir.

Q. Did he seem to understand the questions you asked regarding the corpsman?
A. Yes, sir.

Q. Did you ask him any questions about his medical history during your interview?
A. No, sir.

Q. You would have never indicated anything about that?
A. No, sir.

DC (1STLT FOLK): Thank you, sir.

IO: Captain Francis?

TC: No, sir.

DC (CAPT JASPER): No, sir.

CC (CAPT STUDENKA): No, sir.

IO: I have no questions. Sergeant (b)(6) you are free to resume your duties, whatever that may be, at this time. Is there any need for Sergeant (b)(6) to be available for recall?

TC: No, sir.

DC (CAPT JASPER): No, sir.

CC (CAPT STUDENKA): No, sir.

DC (1STLT FOLK): No, sir.

IO: So you are free to go. It looks like your services here at this Article 32 are no longer needed. And at your conclusion, I remind you -- or caution you not to discuss your testimony with anyone other than the lawyers involved in this case or lawyers representing any other Marines involved in the investigation linked to this case, nor speak to the media, although I can't order you not to do that. But if you should choose to speak to the media or, if they contact you, I would be very careful of what you say to them. Okay?

WIT: Yes, sir.

IO: You are excused. Thank you.

WIT: Yes, sir.

The witness withdrew from the courtroom.

IO: Captain Francis, you want to call your next witness?

TC: Yes, sir. Lance Corporal (b)(6)

IO: (b)(6)

TC: Yes, sir.

Lance Corporal (b)(6) United States Marine Corps, was called as a witness by the government, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the government:

Q. Um, please state your full name?

A. (b)(6) sir.

Q. And you are currently a lance corporal in the United States Marine Corps?

A. Correct, sir.

The Article 32 investigation opened at 1257, 27 January 2004.

Lieutenant Colonel (b)(6) U. S. Army, was called as a witness by the government, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the government:

Q. Please state your full name.

A. (b)(6)

Q. And, ma'am, you're currently a lieutenant colonel in the United States Army?

A. That's correct.

Q. Current unit, please?

A. I'm assigned as the Armed Forces Regional Medical Examiner at Landstuhl, Germany.

TC: The court reporter can't hear you, ma'am.

IO: Neither can I.

WIT: I'm assigned as the Armed Forces Regional Medical Examiner in Landstuhl, Germany.

IO: Thank you.

Q. And what are your duties in that billet?

A. As appointed as a Regional Medical Examiner for the Armed Forces Medical Examiner, I'm responsible for medical legal investigations in the area of CENTCOM and EUCOM for all our active duty dependents and civilians that are under DOD or federal investigation.

Q. All right, ma'am. You are a medical doctor; is that correct?

A. That's correct.

Q. Can you just briefly tell us about your licenses?

A. Well, I'm licensed as a medical doctor to practice in the State of Hawaii, and I'm board certified as a pathologist in both anatomic clinical pathology and forensic pathology.

Q. What does that mean?
A. That essentially is a certification process set up from the American Board of Pathology implying that you need all of the training and credentialing requirements and then pass their examinations to practice forensic pathology.

Q. And, now, as a part of your duties, you conduct autopsies. Correct?
A. That's correct. That's part of the medical legal investigation.

Q. How many autopsies would you say that you conducted in your career?
A. Probably, over about a thousand.

Q. Ma'am, how many cases that dealt with asphyxia?
A. Approximately 10 percent of my caseload.

Q. And asphyxia, that would be what?
A. Asphyxia is a process where you have a lack of oxygen reaching the brain and all of the other tissues.

Q. How many of those cases have dealt with strangulation?

CC (MR. ZIMMERMANN): Excuse me. Just so we understand, how many of the 10 percent, or how many of her total cases?

TC: Total.

WIT: Total, I don't think I can give you a number. But of the 10 percent, probably, about, close to 20 or 25 percent of those.

Q. All right, ma'am. And how many of those that have dealt with strangulation has the manner of death in your opinion been homicide?
A. Probably the majority of those.

Q. Ma'am, you've testified as an expert before in the field of forensic pathology?
A. That is correct.

Q. How many times?
A. Over 20. I've lost count after that.

Q. And what types of proceedings?

A. Either Article 32's or courts-martial. The majority of them have been military.

Q. All right. When you are performing an autopsy, in general sense, how do you go about doing that? What's your SOP for conducting an autopsy?

A. Well, essentially, as I said, it's part of the medical legal investigation which includes scene investigation and evaluation of the scene, identification photographic documentation, collection of evidence associated with the body. We then perform an external examination and an internal examination where we examine the organs within the body, collect specimens for microscopic examination, toxicology, and other special studies; and put this together into determining the cause, mechanism, manner of death, as well as assessment of -- evaluation of patterns of injuries or disease processes; and then include this in a preliminary and final autopsy report.

Q. And you used the words "cause, mechanism, and manner of death." Do those three words have special significance?

A. Yes. Basic definition that I follow are cause of death, which is the proximate event that leads to the physiologic chain of reactions that ultimately end up in death. Mechanism would be the physiologic reactions that end up in death. And manner is basically how the cause of death comes about, whether it's accident, suicide, homicide, natural death, and we're currently using combat related deaths.

So for example, a stab wound to the heart would be the cause of death, the mechanism of death would be the actual injury to the heart, and, say, severe internal bleeding that leads to death; and then the manner of death would be homicide, using our legal definition, the death at the hands of another.

Q. All right. Ma'am, let's talk about, specifically, asphyxia. Now, again, that's a general definition. But when we're talking about asphyxia, I assume there's got to be a lot of different types of ways that someone could die from asphyxia. Is that correct?

A. That's correct.

Q. Is one of those ways -- would be strangulation. Correct?

A. That's correct.

- Q. Now, if someone -- if you could -- if you could just describe for us the different means by which, when you're looking, like, in a strangulation case, how someone could potentially die.
- A. I guess there are different classifications, basic ones are -- when you're talking about strangulation, you're talking about a compression, constriction, around the neck that can lead to either compression of the major blood vessels bringing blood to and from the brain, compression of the airway. Less common would be also due to the injury of the structures of the neck, the cartilages and bones that would lead to either hemorrhage and edema or fluid loss into the tissues and swelling in the inner portion of the major airway that could lead to obstruction of air to getting to the lungs.

So the major processes are considered ligature strangulation, and that is where you have a cord, some type of wire, or blunt object that actually encircles the neck and compresses these objects and causes the injury. And then depending on the definition used, there's a manual strangulation that could either be just hands alone across the neck, compressing these structures or creating the injury, some we'll lump under manual strangulation also the use of limbs, which can be arm, forearm, some type. And that also can be referred to as yoking or a choke hold as well.

- Q. What type of indicators do you look for to determine, in your opinion, whether someone has been strangled or not?
- A. There are some basic hallmarks of strangulation. One of the major first ones often listed would be fracture of the hyoid bone or the major cartilage structures in the neck --
- Q. Let me just stop you there, ma'am. Can you just describe for us what you are referring to when you say hyoid bone?
- A. The hyoid bone is a very small bone of various degrees of calcification depending on age that is almost horseshoe shaped that is right at the top of the airway rather deep within the neck.
- TC: And for the record the witness took her right hand and made kind of like a U shape with her index finger and thumb and placed it up to the top portion of her neck.

IO: Uh-huh.

WIT: Let me -- that is one of the hallmarks of strangulation. There are others varying in degrees of specificity.

Q. Like what, ma'am?

A. Injury to the neck and the area that can either be external injury or injury in the form of hemorrhages to the soft tissues, the muscles under the neck. Another sign which would be less specific because it can be seen in other types of circumstances would be the presence of petichiae in the eyes or other areas in the body. Petichiae being very small either pinpoint hemorrhages in the very small blood vessels; sometimes it can even be larger hemorrhages due to -- depending on the mechanism, the lack of oxygen making the small vessels very leaky or the increases in vascular pressure from the prolonged compression against the blood vessels in the neck.

Once again, these are nonspecific, not always seen in strangulation or other forms of asphyxia. It can be seen in other disease processes. And then the list gets less specific as you go along in terms of hallmarks of asphyxia.

Q. Let's talk specifically about petichiae for just a moment. You're mentioning that possibly an indicator in strangulation would be petichiae in the eyes. Correct?

A. That's correct.

TC: Do you need a spelling on that, sir?

IO: I certainly do. Staff Sergeant (b)(6) doesn't, but I do.

TC: Can you give us a spelling, ma'am?

WIT: P-E-T-I-C-H-I-A-E.

Q. Now, ma'am, again, going back to my question, you mentioned petichiae as being an indicator looking in an individual's eyes. Could you just please describe in a little more specificity as to what would cause that type of condition to appear in the eye?

A. It's somewhat controversial in the literature, but I think the prevailing thought is the combination of a lack of -- anoxia, lack of oxygen getting to the brain through the blood, where the small blood vessels

actually can become leaky and start leaking blood from them. But also a likely combination is the increased, either we call it hydrostatic or vascular pressure, forcing the blood from an area above the constriction to where the point -- the pressure will also cause these as well.

Q. Now, if there's more pressure applied to the neck in a strangulation case, would you expect to see more evidence of petichiae, like in the eyes, for example?

A. Well, generally you'll see them above the point of pressure or constriction. So, yes, you would expect to, but you don't always. And depending on what source of literature that you're reading, anywhere from 60 to 80 percent, you'll see petichiae. And a lot of it is very dependent on the mechanism that causes the asphyxia.

Q. Ma'am, going back to the hyoid bone -- and you mentioned that was an indicator, a damaged or broken hyoid bone, in a strangulation. Please describe what you mean by that.

A. Well, first it's not always seen in strangulation. The hyoid bone starting at younger ages it's less calcified, much more flexible, so generally in young adults we may not see fractured hyoid bones. As individuals get older, that gets more calcified and more brittle, and we tend to see it more often. But once again, we don't see it at all times, but it is considered a hallmark when you see that in strangulation.

It's fairly rare to see in other circumstances. You can see it in accidents, traumatic injury, such as high impact motor vehicle accidents with severe hyperextension of the neck backwards or, say, the dashboard coming into the neck at a specific location. But this is rare and not reported often. I think the numbers are less than .02 percent of traumatic deaths.

Q. You're talking about, I guess, possible car accidents, that type of thing, causing the break of a hyoid bone. Could a break occur if someone were to put manual pressure on someone's neck?

A. Yes. And I think that's one of the reasons it's considered a hallmark of strangulation.

Q. Ma'am, I want to talk about antemortem and postmortem injuries on the body. Now, could you define for us what antemortem means?

A. Antemortem is considered prior to death.

Q. And do you know how that is spelled, ma'am?

A. A-N-T-E, mortem, M-O-R-T-E-M, one word, usually.

Q. Postmortem would refer to after death?

A. After death.

Q. Are there things that you can look for in connecting an autopsy that can tell you whether an injury was received antemortem or postmortem?

A. Certain appearances of the injuries such as abrasions, different coloring, different consistency to them, degrees of hemorrhage that's associated with the injuries. Generally if it occurs postmortem, you're not going to see much bleeding as opposed to prior to death. And also we look for what's called vital reaction. And this is a reaction of the tissues in response to the insult, and that is something we can see either grossly or microscopically.

Q. Ma'am, can you recall what you were doing on the -- 10 June 2003?

A. I believe that's the day when we were in Iraq in Talil Air Base performing an autopsy on (b)(6)

Q. How is it, ma'am, that you were assigned to conduct this autopsy?

A. I was asked by the Armed Forces Medical Examiner to deploy to perform the autopsy. This was after consideration was given first to have the remains brought to Germany, which, of course, would have been the better situation, but this was addressed with the senior SJA at CENTCOM based on the various international laws, regulations, or sensitivities, it was determined that that would not be possible. So at that point we were asked to deploy with a team consisting of myself, forensic assistant trained in photography as well and a forensic odontologist also with photography experience. And we deployed to Iraq to perform the autopsy.

Q. Did you provide -- were you provided any type of information regarding the state of the body or any information whatsoever regarding (b)(6) prior to conducting the autopsy?

A. We had relatively little information prior to our arrival there, and then they had an NCIS agent there as their representative, and I was able to obtain more information there. Essentially, the mortuary affairs people there gave us an indication of what to expect once we performed the autopsy.

Q. And what was that, ma'am?
A. Basically, this was in June, period of fairly extreme heat. I think it was averaging -- I think that the low was 126-degrees. And the refrigeration units they had set up there was definitely suboptimal for those temperatures. So during the time -- the body had been there; it decomposed to a pretty fair degree.

Q. All right, ma'am. And you actually did conduct an autopsy of (b)(6) on 10 June 2003?
A. That's correct.

Q. Can you just please describe for us what you did in conducting that autopsy?

A. We basically brought all our equipment with us having done this on other occasions, either in Afghanistan or Iraq, downrange, and, basically, performed the autopsy as I described starting off with the photographic documentation. At this time there was not much in terms of evidence collected because of the handling of the body and the state of the decomposition -- performed an external exam, internal exam, and collected specimens for toxicology and microscopic examination to bring back with us for evaluation.

Q. Now, ma'am, let's talk about your external examination. When you conducted that external examination, did you notice any abnormalities?

A. (b)(6)

Q.

A.

AE XXII Pgs 9-14 Removed under (b)(6)

Q. Have you ever heard of someone breaking a hyoid bone and being able to just live with that without any treatment?
A. Yes. It's not the common mechanism that we see with strangulations. Normally, the asphyxial process due to the compression of the vessels the blood vessels or compression of the airways can actually lead to death within about, anywhere, from one to four or six minutes. And so normally death occurs right away.

However, uncommonly, it has been described that due to injury either a fracture of the hyoid bone or the other cartilage structures in the neck, you can get enough hemorrhage and swelling where, as I mentioned earlier, can actually obstruct the breathing process. And in the clinical literature, this is described with folks who have survived strangulation or high impact automobile accidents which will actually presented to an emergency room seem perfectly fine will come back eight hours later with severe respiratory compromise requiring intubation and various other procedures, basically, life threatening conditions. So, yes it's described not as often in forensic literature, but it has been known to occur.

Q. Okay, ma'am. I want to show you a series of photos. These are IO Exhibit 33. Ma'am, can you just take a quick look at these. And I have a few more up here that I'll show you, ma'am, not getting in that stack. This stack, this is all IO 33. Do you recognize those photos?

A. Yes, I do. These are the photos we took at the autopsy of (b)(6)

Q. All right, ma'am. And the second pile, this is IO 33 as well. Do you recognize those?

A. Yes, I do.

Q. And, again, that's the same?

A. Same autopsy.

Q. And, also, ma'am, I'm going to show you three photographs from IO Exhibit 9, photos 13, 1, and 11 of 17.

IO: What's the numbers of those photos?

TC: Thirteen, one, and eleven, sir.

Q. Ma'am, the first time you saw those photos was the other day when you came to my office. Correct?

A. Yes. These were the NCIS photos which they had promised to send me which I normally use as part of putting my case together, but that didn't happen so I saw them for the first time here.

Q. All right. Now, on those photos, does that appear to be the same (b)(6) that you conducted the autopsy on?

A. Yes, it does, except that at this point he is not started the process of decomposition. So these are different in that respect.

Q. All right. Thank you.

Ma'am, I want to show you some photos from the autopsy and just have you explain what we're looking at. All right, ma'am. This is photo 8 of 79 of IO Exhibit 30. Ma'am, could you -- sir, if I could just have the witness step down from the witness chair so she's able to see the photos better and reference some of the certain things we're looking at.

IO: Sure.

Q. Ma'am, this is a photo taken during the autopsy. Correct?

A. That is correct.

Q. And what's significant about this photo?

A. This is one of the standard part of the photos that we do. We'll start off with the overall view of the body, either as is as we receive them and then after we've cleaned them up.

CC (MR. ZIMMERMANN): Excuse me, ma'am.

Mr. Investigating Officer, we have 79 photos here, and I would request this go in question and answer. He asked her, What is the significance of the photo. Sir, I'm going to object if we don't get a responsive answer or we will be here for three or four weeks because there's 79 of these photos. The question was, What's the significance of these photos. And I'm going to object and ask that the question-and-answer method be used.

IO: Well, I don't think --

Are you going to go through all 79 photos?

TC: No. Like the ones that -- this is just to --

IO: I understand your objection. I don't find this to be objectionable though. So I'm going to overrule the objection.

But if you could try to confine your examination to a question-and-answer format, that would be appreciated.

TC: Yes, sir.

All right, ma'am. Looking at the photo, obviously, he's in a state of decomposition. Correct?

A. That's correct.

Questions by the government:

Q. And, I guess -- now, ma'am, I want to show you another photo here. At some point during the autopsy, there was a cleaning process that's done with the body. Correct?

A. That's correct.

Q. All right. I want to show you a photo now -- and this is photo 48 of 79.

Now, ma'am is this photo -- is that taken prior to him being cleaned up?

A. Yes. That is the facial ID photo prior to being cleaned up.

Q. Now, what is it that's all over him that needs to be cleaned up?

A. Well, this is part of the decomposition process that shows the darkening, discoloration, of the skin. He actually has skin slippage. Some of the fat and other products within the skin will actually start to congeal somewhat and will be seen over the surface of the skin.

Q. All right. Ma'am, is this a photo of after you've cleaned him up?

A. Yes. That was the photo -- so some of the things that are obscuring are removed, but with this type of decomposition, it's not possible to remove all of it.

IO: Excuse me. What's the number of that?

TC: Sorry, sir. Number 46 of 79.

What's used to clean up a body?

WIT: We have certain solutions and sponges and technical things for this type of -- actually nontechnical materials for this type of thing to handle it to try and clean them up as much as we can.

CC (MR. ZIMMERMANN): Objection. She's being nonresponsive. He said what was used, and she said things.

IO: She said various solutions.

CC (MR. ZIMMERMANN): Various solutions. All right.

Q. Can you recall any specific solution, ma'am?

A. No. It's a solution that we use at the mortuary for this purpose. I cannot tell you what the name of it is. I may have known it at some time, but I have not paid attention to it.

Q. Well, is there anything in the solution that could give a false reading as to a contusion or a broken rib or something like that?

A. No, there's not.

Q. Ma'am, you talked -- you told us about petichiae and the significance of it. And I'm going to refer now to photo 50 of 79. In (b)(6) did you find any petichiae?

A. Not that I could see, no. The --

Q. I'll show you the photo again.

DC (1STLT FOLK) (1STLT FOLK): Was that photo 5-0, sir?

TC: 5-0.

WIT: That doesn't project real well. But as you may be able to see, the eyes were very dried; and in the process of the decomposition, it's possible that there was some petichiae that I could not see because of this drying process. But, no, I did not see any petichiae.

Q. Okay. And as far as your findings, ma'am, did that help you make any -- draw any opinions or conclusions?

A. The presence of them are certainly supportive of an asphyxial process like strangulation, but usually -- and

depending on the literature, you'll only see them about 60 to 80 percent of the time. So, no, ultimately, it didn't affect my opinions.

Q. Well, if you had a individual what was strangled but it was a constant minimal force that was used, would you expect to see petichiae?

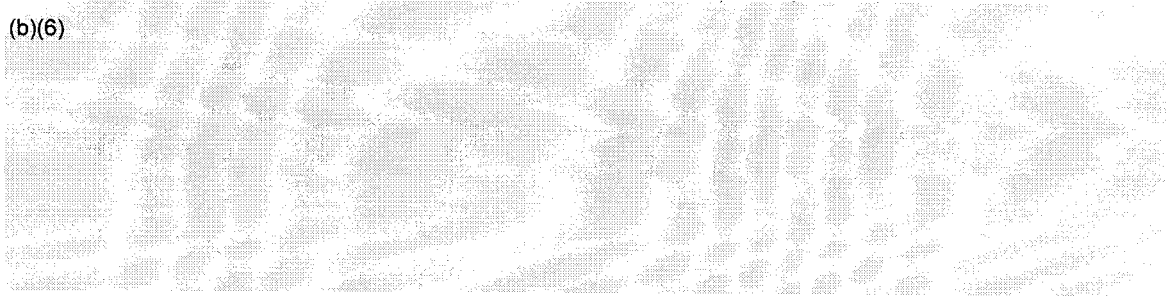
A. Yes, you'd expect to, but you don't always.

Q. Okay, ma'am. I'm now going to show you photo 14 of 79. What's this a photo of, ma'am? That's (b)(6) backside. Is that correct?

A. That is correct.

Q. Can you look at this photo at this point and tell us if you see anything that would be indicative of an antemortem injury?

A. (b)(6)



Q. Ma'am, what's the phenomenon called lividity?

A. Lividity is a process that occurs after death. Basically, where the blood will start to settle outside of the blood vessels, and that is usually in the dependent portions of the body due to gravity and that will cause a darkening, a dark purple, discoloration of the skin as well.

If the significance being -- though that can often be confused with contusion and abrasions, and it's, basically, a matter of experience to differentiate. And that's one of the reasons that we make the incision through the skin to help differentiate them.

Q. And that is certainly something that you are trying to distinguish between is lividity and an actual contusion?

A. That is correct.

Q. I'm now going to show you photo 39 of 79. What's that a photo of ma'am?

A. That is an incision that was made on that dark purple contusion that we saw on the mid low back on the previous photo. And in there you can see rather than the nice clean yellow-red tissue that we see, there is hemorrhage that is into the underlying fat and soft tissue on the back.

Q. And this was something that you determined was a contusion?

A. A contusion.

Q. An antemortem injury. Correct?

A. That is correct.

Q. A recent injury?

A. That is correct.

Q. I'm now showing you now, ma'am, photo 31 of 79.

CC (MR. HIGGINS): 31?

TC: Thirty-one. Correct.

Can you tell us what this photo is of, ma'am?

WIT: (b)(6)



Q. And you, on these injuries, you thought that these were antemortem injuries?

A. That is correct.

Q. Of a recent nature?

A. That is correct.

Q. Ma'am, I'm now showing you photo 65 of 79. Do you recognize this photo, ma'am?

A. Yes, once again this is not projecting quite as well as actually looking at the photo. But this is the

(b)(6)



Q. All right, ma'am. Well, let's talk about -- can you tell by looking at this what swelling would have been antemortem vice post- at all?

A. No. It's very difficult after death. You can have severe fatal swelling, and after death, it can just go away or shrink up. So oftentimes you can't tell. People who have died from severe infections that have very swollen internal tissues in the larynx, sometimes you can't tell that that had occurred after death. This is the same thing when you are dealing with swelling due to injury as well.

Q. Ma'am, were you able to tell from looking at it whether it would have been a recent injury or not?

A. The hemorrhage that's into the tissue, yes, was a recent injury.

Q. All right. And from the, I guess, severity of the injury that you observed, could you tell whether, in your opinion, the death could have been instantaneous or it could have been, like, for example, the injury occurred and then death occurred hours later?

A. This is more significant than what I have seen, what's been described for deaths that occurred in asphyxial processes within that four to six minutes; people die right away. That is usually just a very small amount of hemorrhage associated with the hyoid bone. In this case this is very significant hemorrhage, actually, penetrating the space within the soft tissues and extending downwards. And I would surmise that this would have taken time to occur.

Q. So this theoretically could have taken a period of hours for that swelling to have occurred?

A. For this type of process; but, yes, that is what's been described.

CC (MR. HIGGINS): I'm sorry described by whom?

WIT: For instance in the clinical literature, Kauffman and all, described that in the American Surgeon Journal, I believe; and he listed the time frames on the cases that they've had and had survived for the period of time and how long it took until they got -- the lethal compromise of the airway; however, those were treated, and they were able to live.

CC (MR. HIGGINS): Sorry about that, Captain Francis. I was just trying to find what she was talking about.

Q. Posing another hypothetical, an individual is somehow grabbed by the neck at a certain point in time and a constant force or pressure is put on that neck for a period of seconds and dragging a person's body for, maybe, 20 or 30 feet, could that occur creating this injury which then could result in someone dying a period of hours later?

A. Yes, that could happen.

Q. And could you please describe for us how that can happen as far as the mechanics of what's going on in the throat the hyoid bone?

A. Depending or not whether there was additionally compression of the blood vessels in the neck and the airway along with the fracture, yes, that can occur. At

some point in time, the tissue swelling and the hemorrhage as it gets more severe over time, due to the hyoid bone fracture can cause eventual swelling to the point that it actually obstructs the airway, and they die after the actual incident.

Now, there may or may not be with that kind of scenario enough injury or enough compromise of the airway and the blood vessels that actually lead to asphyxia of the type that can kill them right away, but if they are not killed right away, that may be a contributing part along with it or it could just be the laryngeal swelling alone that could ultimately result in death.

Q. How about -- do you think that this finding on the hyoid bone and with what we're looking here at the photograph, do you think that's consistent with, possibly, someone who might have grabbed him by the throat a period of more than 24 hours, meaning if someone came and grabbed him by the throat 40 hours prior to the time of death, would you expect that he could live for 40 hours with that kind of injury?

A. That's a relatively long time frame. I've not seen that described that long. I would say, I don't have the clinical expertise as a medical doctor to say, I would be inclined to say no just based on my experience and what I have read in the literature.

Q. Okay. How about the situation where an individual has, as you've described, the broken ribs and then has this fracture in the neck and then has some sort of asthma associated with that, how could all of those factors come in to play as to potentially being a result of death if at all?

A. Well, certainly the fractures to the ribs could be a contributing factor. When you have fractures like that, first, they are going to be very painful and generally breathing -- or the mechanics of breathing is minimized with that. Also, especially being on both sides, just physically that could interfere with efficient breathing and could compromise it somewhat. So, yes, that would be a contributing factor; but of and by itself, not a fatal injury.

Q. (b)(6)



that there could have been an other cause of death other than strangulation?

A.

(b)(6)

IO: Are you done questioning the witness about that photo?

TC: Yes, sir.

IO: I have a couple questions.

Is the hyoid bone shown in this particular photograph; and if so, where would it be?

WIT: In this photo, I cannot see it. I know that it was taken out intact and when I photographed it was there. I don't see it there. But at the top part of that on the left, there is a projection, a small projection, that is sticking upwards.

IO: Point to it.

WIT: Right here [indicating].

IO: Okay.

WIT: From what I can see with this photograph, that looks like that could be one of the horns of the thyroid cartilage, and it's just that what we are not seeing is the hyoid bone, which is more on the front portion of it. We're looking at this from the back. However, the hyoid bone would essentially come right up around this above the thyroid cartilage, here, projecting back -- the horns projecting back towards me in the photo.

IO: Okay. Thank you.

Questions by the government:

Q. So, ma'am, the significance of the photo, here, is the swelling that's indicated?

A. The swelling that suggests, but more importantly it's the hemorrhage associated with the region of the hyoid bone fracture that is extending down into the soft

tissues of what we call the perilaryngeal soft tissues -- or the soft tissues associated with the larynx.

TC: Any more questions on that photo?

IO: No, thank you.

Questions by the government:

Q. Ma'am, as we discussed these are the series of photos that you would have like to have had in conducting your autopsy, but NCIS hadn't provided them. Correct?

A. That is correct.

Q. But you did get a chance to look at them the other day?

A. Yes, I did.

Q. Now, by looking at those photos, are there certain opinions that you can draw based on your observations of the body?

A. Are you talking on just the ones that you just showed me or the whole stack?

Q. Just the ones I showed you.

A. On the one photograph that shows the injuries to the chest, those are bruises that I did not see at the time of autopsy; but those are in the area where the fractured ribs would have occurred on the right, I believe it was.

Q. All right, ma'am. I want to show you --

A. And those were contusions of blunt force injuries in that area of the rib fractures.

Q. I'm going to show you photograph 11 of 17 that you already gave back earlier.

IO: Is this still IO Exhibit Number 30?

TC: This is Exhibit Number 9.

IO: I mean 33. So this is Number 9 now?

TC: Number 9.

IO: Exhibit Number 9. All right.

TC: Eleven of 17.

CC (MR. HIGGINS): That's IO 9?

TC: Correct.

All right. Ma'am, looking at this photograph and comparing it to your findings in the autopsy does this tell you anything?

WIT: Yes. This is a blunt force injury, a contusion, in the area of the right nipple that are also in the area of the fracture; so this could have been the impact that caused the fractures to the ribs.

Questions by the government:

Q. Ma'am, is that pattern there -- is that consistent with a boot?

A. It's somewhat patterned; and if you told me this could be consistent with a boot, yes.

IO: I think he was asking you if it was consistent with a boot.

WIT: Yes.

IO: Not whether he was telling you and you were --

WIT: Yes, it could be consistent with a boot. It's not a great pattern injury to say certainly not specifically. But it does look consistent with a boot.

TC: Ma'am, if you could just return to your seat.

The witness did as directed.

IO: Are you going to show any more photographs to the --

TC: I don't know if the defense is, sir, that's why I have it running.

IO: I was just asking so we could turn the lights back on for the time being.

TC: Do you need the photographs, sir?

IO: No.

CC (MR. ZIMMERMANN): If you're not through --

IO: Why don't you leave it on, but just turn the over-head lights on. And then when cross-examination comes up, we can turn the lights back off.

TC: Yes, sir.

Ma'am, there were microscopic specimens taken of
(b)(6)

WIT: There were specimens taken for microscopic examination and toxicological examination for us to perform when we returned to Germany.

Questions by the government:

Q. All right, ma'am. And was there a problem with those specimens?

A. Yes, there was a problem with the specimens during transport.

Q. And can you please just describe for us what that problem was?

A. We collected the specimens as we normally would do in the containers, brought special coolers for them. Normally, we would refrigerate them prior to our redeployment, in this case refrigeration was definitely suboptimal. No ice was available. As I said earlier, I believe, it was very hot; it about 126-degrees I think on the day that we left. And unfortunately as we were going to get our plane, we were on the runway with our pallet and all of our specimens, and due to the combat situation our plane was diverted and we were left on the runway for some time having to await another plane with these specimen's. It was specimens already decomposing and producing gases, the severe heat only intensified that and they exploded in our containers. And we ended up with a mess that really was not suitable for examination.

Hearing of this and discussing this with the Armed Forces Medical Examiner, NCIS did go back to exhume the body and get specimens for toxicologic examination, but those were not suitable for microscopic examination.

- Q. As far as the toxicology screen that was done on the samples that were taken from the exhumed body, those came up negative?
- A. That is correct.
- Q. What do you look -- what typically is being looked for in that type of an analysis?
- A. Any, you know, toxins. This actually was a very comprehensive drug analysis using the standard toxicology, and any types of substances, drugs, volatiles, that could be possibly fatal or at least -- or be significant to the outcome of the case.
- Q. And that came back negative?
- A. That came back negative.
- Q. And, ma'am, you also checked (b)(6) heart?
- A. That is correct.
- Q. And that was healthy?
- A. There was no evidence of any abnormalities other than decomposition.
- Q. Right. Okay. Now the injuries that you observed on (b)(6) for example, the contusions on the legs, were those consistent with a blunt force type of injury that could be the result of a kick or a punch?
- A. Yes, they were.
- Q. The injury to the lower back, the contusion there, was that consistent with a kick or a punch?
- A. That is correct.
- Q. How about the broken ribs, consistent with a kick or a punch type injury or a force?
- A. Yes, they -- a force that could be a kick or could be a punch.
- Q. Okay. All right, ma'am. Going back to the microscopic specimens, what would be their purpose?
- A. There are things that we can see under the microscope that we cannot see grossly with the naked eye. In this case there most likely not have been very helpful just because of the degree of decomposition, but different tissues decompose more rapidly than others and it might have been helpful in ruling out some findings, disease processes as such. Not necessarily -- I don't think they would have been helpful in ruling out any fatal

disease processes. But just for completion, that's what we examine in the case, and then we would go into description in detail of what we saw under the microscope.

Q. Now, ma'am, when you gave your opinion that the cause of death was strangulation, I mean, how certain are you of that?

A. I say would say that with reasonable medical certainty.

Q. What does that mean?

A. That is the degree of certainty that is, you know, beyond possibility, beyond more likely than not. Essentially knowing that nothing is 100 percent certain unless I was there and actually was able to see something happen, but this is about as certain as I can be in a medical forensic situation that I hadn't actually witnessed myself.

TC: Thank you, ma'am. That's all we have.

IO: Hold on, Captain McCall [sic], there were some other exhibits that you had introduced earlier subject to authenticating them with this witness. Do you intend to do that?

TC: Yes, sir. We can do that.

IO: All right. I'm talking specifically about IO Exhibits 39, 31, 32, and, I believe, her CV, which is 33, I think -- no, 34. Excuse me.

Q. All right, ma'am. Let's start with IO Exhibit 29. It consists of two pages. Do you recognize that?

A. Yes. This is the standard request form for toxicology for the Armed Forces Medical Examiners Toxicology Lab. This is the form; however, this was not my writing. This was the form that would have been submitted by the NCIS agent to get the exhumed specimens for toxicology. However, this the reporter accompanying -- this is the report that I received for the toxicology for this case.

CC (MR. ZIMMERMANN): Can we save some time here? At least for Lance Corporal (b)(6) I thought we didn't have any objections to any of these as long as she testified. I thought it was conditional, you admitted depending on her testifying.

Since she's testifying, I don't think we need to go through -- at least we don't think she needs to go through them.

IO: Well, I appreciate that. And I appreciate wanting to speed these things up. But these documents mean nothing to me unless someone explains them. To me they are just words and scientific and medical terms that I can't interpret on my own. So there has to be some explanation otherwise they are meaningless to me.

CC (MR. ZIMMERMANN): That could have been all right with us too, sir.

IO: All right. I kind of figured it would.

Questions by the government:

Q. All right, ma'am. So the first page is the actual request for the toxicology screen, I guess. And the second page is the report itself?

A. That's correct.

Q. Eventually you received a copy of that report so that you could make that finding on your autopsy report that the toxicology screen was negative?

A. That is correct. And that's included in my report.

Q. All right. I'm going to show you IO Exhibit --

IO: Okay. Hold on. I got some questions.

With respect to IO Number 29 which is the toxicology report, the fluids or the materials used for this report were not the ones that exploded on the Tarmac?

WIT: That is correct.

IO: Those were completely worthless for any purpose whatsoever?

WIT: That is correct.

IO: And then the body apparently was exhumed at a later point in time?

WIT: That is correct.

IO: By NCIS?

WIT: Yes. And this was at the request of the Armed Forces Medical Examiner.

IO: Medical Examiner. Okay. And then those specimens were what were used to produce this report?

WIT: That is correct.

IO: IO Number 29 that you have in front of you?

WIT: Yes.

IO: When was the body exhumed?

WIT: I don't have that exact date; except, generally, it should either be in the incident details, which it does not appear to be. But it should have been about the time when this was signed because generally those need to be sent right about the time that you collect them. But I don't know that for a fact, what that exact date was.

IO: It was sometime after June 10?

WIT: After June 10, and it was most likely somewhere around the time of July 3, which is the date by the NCIS agent when she sent them because I do know that they send them rather quickly.

IO: Rather quickly after they acquire them?

WIT: That is correct.

IO: So almost a full month after (b)(6) had passed away?

WIT: That is correct.

IO: Does the passage of that much time impact the reliability of the toxicology exam, or is there no --

WIT: It can in terms -- and it's something that the toxicologists know how to assess. One of the things over time, the body produces alcohol postmortem. And I think I said in the opinion in my report, there's a pattern of these findings under volatiles in this report where they did find some things. And this is indicative of postmortem production of alcohol but in terms of

detecting the presence or absences of substances that were tested for, this should not -- the time period would not have affected that.

IO: And the substances being any type of drug or some other --

WIT: Any types of drugs. It's a full comprehensive drug screen and basically all of the thing that can be fatal were looked for.

IO: Was there anything in the toxicology screen that could have produced death?

WIT: No. And essentially, as I said, the alcohol was produced after death.

IO: Was there anything in the toxicology screen that could have contributed to (b)(6) death?

WIT: No.

IO: So there's nothing in his body basically that --

WIT: -- would have contributed to death.

IO: And if he had taken drugs, any of the drugs that are listed here on the toxicology report, would those still be in his system a month later and detectable?

WIT: Yes.

IO: Once you die, they don't leave?

WIT: They don't leave.

IO: Thank you. No further questions.

Questions by the government:

Q. I'm now going to hand you IO Exhibit 31. Do you recognize that, ma'am?

A. Yes, I do.

Q. And what is that, ma'am?

A. This is the preliminary report I issued upon return to Germany. I don't know if you had submitted --

I did initially do a handwritten report there because our printer burned up in the heat as well, so we lost a fair amount of our equipment.

CC (MR. ZIMMERMANN): Did I hear you say that's a handwritten report?

WIT: No. This is one that was written after the handwritten report upon my return to Germany.

Q. And do you have the handwritten report with you when you --

A. I'm sorry?

Q. Do you still have the handwritten report?

A. I still have it. I don't have it with me.

Q. Okay.

A. But it was just basically retyped.

Q. So what's the significance of that document?

A. This is a report just for our SOP. We summarize what we can say at least at time of autopsy and issue these. Either at the time we perform the autopsy or within 48 hours.

TC: All right.

Sir, did you have any other questions regarding that?

Ma'am, I'm handing you IO Exhibit 32. Do you recognize that document?

WIT: Yes, I do.

Q. And what is that?

A. This was -- once again, this was just the typewritten form of the death certificate that I issued after completion of the autopsy.

TC: All right, ma'am.

Any further questions on that one, sir?

IO: No, I do not.

Q. And, lastly, ma'am, can you -- I'll give you 34. Do you recognize that, ma'am?

A. Yes, I do.

Q. That's your CV. Correct?

A. That is correct.

Q. And that's the most current edition?

A. Yes.

TC: Thank you, ma'am.

Further questions on that exhibit, sir?

IO: No, I don't.

It's almost 2:30. What do you say we take a ten-minute break before any cross-examination begins on that. Actually we'll make it 12 minutes and we'll resume back here at 1440. We're in recess.

The Article 32 investigation recessed at 1426, 27 January 2004.

The Article 32 investigation was called to order at 1437, 27 January 2004.

IO: We're back on the record. This Article 32 proceeding will come to order. All parties who were present when the court recessed are once again present. Accused and counsel are present.

Mr. Zimmermann, would you like to begin your examination?

CROSS-EXAMINATION

Questions by the civilian counsel (Mr. Zimmermann):

Q. Welcome to the Marine Corps Base. You and I have not spoken before have we, ma'am?

A. I don't believe so.

Q. Let me ask you just a few quick questions about your background before we get into the substance of your testimony, if I could?

A. Okay.

Q. I notice that you went to Michigan State for three years?
A. Yes.

Q. But you didn't graduate from Michigan State?
A. No.

Q. And went to Arizona State?
A. Yes.

Q. With a four-year interval?
A. That's correct.

Q. Did you go into the Army?
A. No.

Q. For whatever reason you went back to Arizona State, and you were there for three years?
A. That is correct.

Q. So it took you six years to get your BA?
A. BS.

Q. BS. Okay. And I noticed that you wear the bronze star?
A. That is correct.

Q. That's a very high award and thought great deal about -- Marines think a great deal of that. Without going into a lot of detail, can you tell us what you did to get that bronze star?
A. We were very active as part of a, what we call, disaster and mortuary affairs recovery team, which is rather unique to the military. It's combined with mortuary affairs search and recovery and a forensic team headed by myself, where we go to, basically, crashes, multiple fatality incidents, to ensure complete, expedient recovery of the remains while at the same time protecting the forensic investigation, as I act as consultant for the boards.

We had numerous incidents during Afghanistan when we deployed for those, some of those in very hostile environments under hostile fire. And for that reason, we received the award.

Q. We?
A. Basically, the team members, as part of the team.

Q. How many people?
A. Um, myself and four others.

Q. All officers?
A. No. Actually, I think I was the only officer.

Q. So it was a meritorious service award, for meritorious service?
A. For our, essentially, functioning and doing what we did during combat conditions and dangerous conditions.

Q. The bronze star can be awarded for two reasons, meritorious service or heroism. Was yours awarded for heroism?
A. Not for heroism, no. Well, in a sense, actually it was. I believe that was in the write up because of the types of things that we were doing in certain environments and under those conditions. And, yes, that was part of the write up.

Q. Okay. I noticed that you don't have the combat V -- or the V for valor on your ribbon. That's because it was awarded for meritorious service. Correct?
A. Essentially, I think, the description in the write up was for heroism and not for meritorious service.

Q. Is there a reason you don't have a V on your bronze star?
A. As I found out afterwards, the V is for certain valor situations where they get the V with that. So you get it with or without.

Q. Without is for meritorious service; with is for valor or heroism. Correct?
A. That could be; but that's not how I understood it. But I'm not up to all of the terminology for that.

Q. All right. You give out your curriculum vitae when you testify in court?
A. Yes, I do.

Q. And the purpose to that is to establish your qualifications?
A. Yes. That's correct.

Q. So that it adds to your credibility?
A. That is correct.

Q. Now, is there a reason that your curriculum vitae on page 2 says that you were awarded the bronze star for valor?

A. Basically, that was my ignorance at the time before I learned that there was a distinction for the V. When it was described to us, it was for heroism and that was the term I heard used. But, no, I was not aware of that until recently.

Q. When did you learn that the bronze star award for valor was not correct?

A. I don't think I would call it not correct in terms of what I had thought it to be. Basically, I didn't really think about it that that was for valor on the CV, so it was not corrected.

Q. But you know now that you don't rate the combat V, V for valor, because you're not wearing it?

A. I've learned that -- yes, at some point after that was written.

Q. All right. So can we just say that this is a mistake on your CV?

A. Yes, we can say that.

Q. Now, how many -- you said that you have performed over a thousand autopsies?

A. That's correct.

Q. How many have you performed personally that you were the attending pathologist?

A. About all of them.

Q. How many of those were performed on bodies that were not refrigerated for over 32 hours?

A. Probably -- were not refrigerated?

Q. Yes. How many of those autopsies that you performed were done on bodies that had basically been decomposing without refrigeration for a day and a half or more?

A. Basically -- I guess, I'm not quite sure what you're referring to because I've --

- Q. Okay. Let's have this understanding. If I ask you a question and it's not clear, you tell me because I want to make sure that you're answering the question that I'm asking and sometimes I don't ask them very artfully and I'll try again.
- A. Okay.
- Q. Okay. Most of the time in the general practice of pathology someone is conducting an autopsy on a body that died in a hospital or died in a wreck and was taken somewhere where it was refrigerated relatively soon after death. But that's not always the case. Sometimes we perform autopsies on bodies that had been located sometime after death and had been just lying out in the environment.
- And so what my question is: Of those autopsies that you testified you performed, how many of them have been -- approximately how many of them have been on bodies that were unrefrigerated for over 32 or 34 hours? If you can remember.
- A. And so decomposing.
- Q. Yes.
- A. I couldn't give you a number for that. Certainly less than ten percent.
- Q. It's much more difficult than to do it in a body that had passes away in a hospital and has been refrigerated instantly. Correct?
- A. That is correct.
- Q. And how many of those autopsy that you performed were done on bodies where the autopsy occurred more than 100 hours after death, four days after death?
- A. A great many. Because of the situation we're in, it takes time for the bodies to get to me. So there's a large portion, but I can't give you numbers.
- Q. Okay. Now, let's talk about -- the government counsel asked you about what your normal procedure was when you did an autopsy. Do you recall that line of questioning?
- A. Yes.
- Q. All right.

To save time, would you agree with me that the common protocol is that when you are making an examination and you find something that is abnormal, you document it as abnormal. Correct?

A. That is correct.

Q. And if you don't say anything about a particular finding because it's what you expected to find, you either say nothing in your report or you report that you found no abnormalities. Is that correct?

A. That is correct.

Q. In other words, lets say when you say the heart had no abnormalities, that would indicate that there's nothing wrong with the heart. Correct?

A. That's correct.

Q. Or is there was nothing mentioned about the heart other than perhaps its weight, that would also mean that there were no abnormalities. Am I right?

A. That is correct.

Q. Now let invite your attention to the situation where you have -- your mission in this particular part of the autopsy is to try to determine what the cause of some discoloration is that you find on the body. Are you with me?

A. Uh-huh.

Q. Okay. Now, after a certain amount of time passes where the body has been decomposing whether it's unrefrigerated or not, it's decomposing, would you agree with me that after a certain amount of time passes, it's very difficult to determine from just looking at the external portion of the body whether some discoloration is from decomposition or it's from some pre-death injury?

A. I don't think I'd agree with the term "very difficult." There are occasions when, yes, you need to pay more attention to it. It's more difficult than a well-preserved body. And, yes, so you have to look harder, you have to think more of it an use your experience for that.

Q. For example, the very first photograph that was displayed up here on your direct examination -- and I'm not going to do this unless you ask me. If you ask me, I'd like to see the photograph, we'll ask the

investigating officer if we can do it and put it up there.

A. Okay.

Q. But the first one as I recall was just a picture of Mr. (b)(6) lying on a table. Do you recall that?

A. Yes.

Q. And obviously -- the purpose was to show that he was decomposed. Correct?

A. Correct.

Q. I mean, there were colors. The body was different colors. There were what looked like tattoos when they really weren't tattoos. But there was all kinds of different colors and patterns on that body. Correct.

A. Correct.

Q. Those weren't all from injuries. Agree?

A. That is correct.

Q. Most of them, what we saw from that photograph, were decomposition changes. Correct?

A. That's correct.

Q. And so in order to be accurate -- and you do want to be accurate when you fill out your autopsy; do you not?

A. That's correct.

Q. You did, on some of these purplish contusion areas -- if I recall your testimony -- to make sure it wasn't just decomposition or it wasn't even just plain lividity. You make incisions to look underneath the skin to look for hemorrhages. Correct?

A. That is correct.

Q. And the reason that you did that because if you didn't find any hemorrhage underneath then you knew that that was an after-death or a post-death injury or decomposition. If you found hemorrhaging, it gave you more confidence that that had happened while the heart was still beating, therefore, the person was still alive. Correct?

A. That is correct.

Q. Which brings up something. I know it's probably -- how wedded are you to the proposition that you said earlier on your direct that generally after death the heart stops beating? Do you remember saying that?

A. I believe so, yes.

Q. Can you give me an example of when after death the heart would not stop beating? In other words, what did you mean when you said, generally, that's true? Isn't that always true?

A. Yes. And generally is just a phraseology in my way of speaking, yes.

Q. Is that because maybe you're like most pathologists. I know you don't want to get pinned down to something specific?

A. Well, certainly especially with very good lawyers.

Q. We would agree that one sure sign of death is the heart stopping beating. Correct?

A. That's correct.

Q. Now, lets go to the autopsy that you performed in this particular case. Do you remember who all was present during that autopsy?

A. I remember the majority of the names of the people who were present.

Q. Well, even if you don't remember the names, do you remember their capacities?

A. Basically, yes.

Q. Okay. You had yourself, and you were assisted by what, a staff sergeant?

A. That's correct.

Q. Air Force staff sergeant?

A. That is correct.

Q. And then there were two colonels?

A. That's correct.

Q. Or were there just two doctors, not necessarily two colonels?

A. There were two colonels.

Q. Okay. And then there was an NCIS agent there?

A. That's correct.

Q. Naval Criminal Investigative Service guy?
A. Girl.

Q. Girl. And then there was a Captain Ashe, staff judge advocate from the Marine Corps?
A. I don't recall the names, but I knew there were, I believe, two staff judge advocates.

Q. One was in the Marine Corps, squared-a-way-looking guy?
A. There might have been two squared away. And I can't tell you if they were both Marines.

Q. Okay. Well, there was one Marine captain and one Army Captain. I thought that might give you a hint?
A. Okay. Well that's --

Q. Two lawyers?
A. Yeah, both squared-away looking.

Q. All right. And then somebody was taking photographs?
A. That's correct.

Q. And you knew that the NCIS agent was taking notes. Correct?
A. Whether or not I actually saw that, I don't know; but, generally, that's what they do.

Q. Okay. And if I told you the name (b)(6) would you say that ring a bell?
A. That's the female.

Q. She was the NCIS agent. You had seen her before?
A. No.

Q. Well, if we have any questions from it, I'll show it to you so you know what she said. Okay.

Have you seen Captain Ashe's report, the Marine judge advocate's report?
A. No, I have not.

Q. Did you know he was taking notes?
A. I wouldn't have been surprised.

- Q. You told the government counsel that it's normal for you to receive input as part of your medical legal examination, input as to the circumstances of the investigation. Correct?
- A. That is correct.
- Q. That is from basically law enforcement. Correct?
- A. Yes.
- Q. So before you began this autopsy on 10 June, you got a report from NCIS as to what they thought happened. Correct?
- A. Not really, no. What I got was Agent (b)(6) who was at Talil when we arrived. She told me what had been relayed to her verbally by the agents there, and so we discussed it, and she had taken some notes, but I had not seen any reports and there were a lot of questions as to what was actually going on. So I had minimal information going into the autopsy.
- Q. Do you recall what she told you?
- A. Yes. Basically the scenario where the decedent had been moved into this special area outside, and that's where he was found dead.
- Q. And you were told that NCIS suspected this young Marine had caused the death by dragging him by the head. Right?
- A. Actually I wasn't aware of that at that time. What was presented to me is that the agents at the scene saw no evidence of injury, and they were expecting this to be what sounded like a natural death.
- Q. Did you know that the Marines at this facility where this death occurred had all given statements the day that the body was discovered, some four days before your autopsy, and that those statements had made their way into the hands of the NCIS agents within a day?
- A. No. Actually communications were very difficult in the field. (b)(6) was having difficulty reaching them, so I had none of that information. And I really didn't get that information until several months later.
- Q. Nobody told you to be looking for strangulation?
- A. No, not at all.

- Q. Let's turn then to the ways one can be strangled. Would you agree that you can have mechanical interruption to the airway?
- A. Yes, I would.
- Q. I believe you described some of that. For example, you can have someone that can mechanically interrupt the airway with his or her fingers or hands. Correct?
- A. That is correct.
- Q. That's one way to strangle somebody? Right?
- A. That's correct. I'm not sure the term mechanical -- if that means either interruptions by fractures, microfractures or just compression itself. I'm not sure exactly what you are referring to, but those things can happen.
- Q. If one strangled somebody by hand with enough force and for the proper length of time, that you would expect to leave some type of marks on the neck. Correct?
- A. It can, but it does not always.
- Q. Well, in the strangulation autopsies you've done before, you have found marks where someone was manually strangled. Correct?
- A. Actually, rarely.
- Q. Rarely?
- A. Rarely.
- Q. Okay. How about when a piece of -- an object, I think you described -- how about if somebody takes a rope or a piece of line and puts it around somebody and squeezes it until they strangle them, we have what we call ligature marks left. Correct?
- A. That is correct.
- Q. You didn't find any ligature marks on (b)(6); did you?
- A. No, I did not.
- Q. You didn't find any finger marks on (b)(6); neck?
- A. No, I did not.
- Q. Would you like to see some photos to refresh your memory, or are you sure you didn't?

I want to offer you the opportunity to look at photos when I am asking these series of questions.

A. I can tell you that I did not see them at autopsy.

Q. And we can verify that because we can look in your autopsy report, and if it's not mentioned we know you didn't see it because if you would have seen it, you would have put it in. Correct?

A. That's correct.

Q. Okay. That's the basic premise that we work with. If you see it, you put it down; if you don't see it, we can assume it wasn't there. Right?

A. That's correct.

Q. All right. How about bruises to neck tissue as a result of this mechanical -- you call it compression, mechanical compression --

A. Uh-huh.

Q. -- or interruption. We would see tissue bruising if it were of sufficient force and length to obstruct the airway and cause someone to die, you would expect on autopsy to find bruising to the tissues of the neck. Correct?

A. You can, and there are times when you don't.

Q. Okay. Did you find any of this?

A. No, I did not.

Q. And when you have this mechanical interruption or mechanical -- this compression type of strangulation, the actual cause of death is that there's a cessation of the flow of oxygen to the brain. Is that in layman's terms pretty much what happens? You cut off the flow of oxygen to the brain, the brain has to have oxygen, and after a period of time, it dies. Isn't that true?

A. That is one of the common mechanisms, yes.

Q. For this type of strangulation where someone mechanically interrupts the airflow, that's what happens?

A. And if that happens for a sufficient period of time, yes.

Q. All right. Let's talk about that. If that airway is blocked with force for three to four minutes, that will result in death. Correct?

A. I'm sorry. Can you repeat that?

Q. If the airway is blocked for three to four minutes, that's all it takes to kill somebody by strangling them -- if you interrupt the air flow for three to four minutes --

A. Air flow, yes.

Q. Right? So it only takes three to four minutes to do that?

A. It varies in the literature. I've seen four to six, three to four. It's variable.

Q. Okay. Three to six. Would you agree with that?

A. I would agree with that.

Q. Now, in addition to not finding finger marks or ligature marks or bruises on the neck of (b)(6) you found no defensive marks anywhere on him where you would expect if someone were resisting strangulation -- are you with me?

A. Yes.

Q. In other words, so that the IO knows what I'm asking and what you're answering, you checked his fingernails to see if his fingernails were broken. Right?

A. That's correct.

Q. You didn't find any broken fingernails?

A. I don't recall. I'd have to refer to my report for that.

Q. You didn't write anything in the report about it, so we assume you didn't find them. Right?

A. That is correct.

Q. All right.

And I assume you looked underneath his fingernails to see if he were being strangled he would reach up and try to pull somebody away, if his fingernails grabbed skin, either from the person that was strangling him -- right? That's always a consideration. That's what you look for when you're looking at the fingers.

A.

Q. And that's what you did look for in this case?

A. Yes.

Q. And you didn't find any skin under his nails?

A. No.

Q. And another way to get skin under one's nails under that situation is if you were -- can you come up here, Kyle, and pretend you're going to choke me.

IO: We know you've wanted to do this for a long time.

CC (MR. ZIMMERMANN): That's right. So pretend.

Let the record reflect that he's choking me, and I am trying to get his hands off of me. I can either scratch his fingers -- excuse me -- or his hands and get his skin under, or I can reach under and in an attempt to get him off, I can actually get my own skin under my fingernails. You found that before?

WIT: Yes.

Q. But not in this case?

A. Not in this case.

CC (MR. ZIMMERMANN): Do you have IO 9 up there, sir?

IO: Yes, I do.

Should we turn off this bank of lights for you?

Q. Can you see that?

A. Yes, I can.

Q. And these are in evidence already as the photographs taken by NCIS prior to your autopsy that you didn't see till just a while ago. But you can see clearly his neck, there? I mean, you don't see any of those indications that we talked about on the right side of his neck; do you?

A. No, I don't.

IO: Mr. Zimmermann, I'm sorry. Can you identify which photo, one of --

CC (MR. ZIMMERMANN): Yes. This is 2 of it says 17, but I think it's 2 of 11. Right? It's marked 2 of 17.

IO: I think we've reduced it down.

Q. And here is the other side, and you can see there's no marks or any indication of any kind of injury to the neck on that side of the his neck. Do you agree?

A. I agree.

Q. And that is Number 3.

Now, during your -- in your report, your autopsy report, postmortem examination on (b)(6) you found that the larynx was normal. Correct?

A. I would not call --

Q. Yes or no?

A. I would not call it normal.

Q. Well, you did call it normal. This report that you submitted -- would you like to see the autopsy report? Let me show you.

I'm on page 3 under the respiratory system, counsel.

A. Okay.

Q. Let me just read it to you so the IO can follow along. Respiratory system -- and you tell me if I read it wrong -- the larynx, trachea, and bronchi show no abnormalities. Did I read that correctly?

A. Yeah, in that case, that would have been an oversight.

Q. An oversight?

A. Yes.

Q. We have a young man charged with homicide based on your autopsy report. And here you have an oversight where you marked the larynx, trachea, when it was right fresh there, the day you did it, you marked it as normal and we just established that means there's no -- you even say there's no abnormalities?

A. Yes.

Q. That conflicts with your testimony today; doesn't it?

A. Yes. And as I said, that's an oversight.

Q. An oversight?

A. That is a standard template that I should have eliminated that out of that.

Q. You signed that -- I'm sorry. Your testimony was that you had two other doctors discussed your findings, and you all agreed on these findings before you put your signature on an official United States Government autopsy report and submitted to these young prosecutors who relied on it.

Was that a mistake like the bronze star for valor on your CV?

A. Yes, it was.

Q. If the larynx is normal and the trachea is normal, that would mean that the vocal cords are normal. Correct?

A. That would be part of the larynx, yes.

Q. And if the larynx were normal and the trachea were normal and the vocal cords were normal, there would be no obstruction of the airway. Agreed?

A. If that were the case.

Q. That's what your report says.

A. Yes. And that was the oversight in leaving it that way.

Q. And you agree, do you not, that you are basing this -- as you called it an oversight -- conclusion on a broken hyoid bone?

A. That is correct.

Q. That's it. Right?

A. Yes.

Q. I mean there's nothing else to support your conclusion of strangulation except that broken hyoid bone?

A. That's correct.

Q. Even though your report says that the -- to be fair to you, let's establish this because I'm not sure that everybody in the room knows -- and more importantly I want to make sure that the IO knows, the investigating officer knows -- the hyoid bone is associated with the organs that you described as being normal, that is, the larynx. Correct? It's the top part of the larynx?

A. That is correct.

Q. And you agree that despite your now conclusion that the death was the result of -- the cause of death was a hyoid bone fracture and associated hemorrhaging, that you don't have a photograph of the hyoid bone anywhere

in those 89 photographs taken at the autopsy? Am I right?

A. There is the fracture of the area of the hemorrhage associated with the hyoid bone.

CC (MR. ZIMMERMANN): I'm going to hand the investigating officer one copy of the same photograph because those blow-up pictures -- those prints are not really clear.

Maybe we can turn the lights back on, please.

IO: Is this a picture of IO Exhibit Number 33, picture number 65? Is that what this is?

CC (MR. ZIMMERMANN): Where is their exhibit?

IO: I have it right here.

CC (MR. ZIMMERMANN): Yes.

IO: They are the same.

CC (MR. ZIMMERMANN): Yes.

IO: So what you're showing her is a 3 by 5 of IO Exhibit Number 65.

CC (MR. ZIMMERMANN): Sixty-five of 79.

IO: Sixty-five of 79.

Q. All right. And this is a little more clear. I'm showing you what you testified with regard -- without what you testified to -- the hyoid bone sits atop what structure?

A. The top the thyroid cartilage.

Q. The thyroid cartilage. And what we have a picture of here is the superhorn -- is that the right term, superhorn of the thyroid cartilage?

A. That's a good term for it.

Q. Not bad for a lawyer from Texas. Right?

A. Sure.

Q. Now, that's what that is a picture of; isn't it?

A. This that we're seeing here?

Q. Yes.
A. Yes.

Q. Because the hyoid bone itself is like a horseshoe.
Agreed?
A. That's correct.

Q. And you said we're looking at this from his back, like
from behind the neck toward the nose. Correct?
A. That is correct.

Q. So if the hyoid bone were in this picture, we'd expect
to see the two ends of the horseshoe connected by bone
that would represent the U in the horseshoe. Do you
follow me?
A. Yes.

Q. And we don't see that.
A. It's not showing up in that view. That's correct.

Q. Because this is not a picture of the hyoid bone; is it?
A. This is the area of the hemorrhage associated with the
hyoid bone.

Q. But the hemorrhage is not in the hyoid bone; you said
the hemorrhage is in the tissue below the hyoid bone.
A. Yes. But at autopsy, I could distinctly see the
hemorrhage associated with the fracture in the hyoid
bone.

Q. Okay. Didn't you say you cut the hyoid bone away
separately, or did I misunderstand you?
A. No. I did not.

Q. You did not. You did not cut the hyoid bone away
separately?
A. No, I did not.

Q. So where is the hyoid bone?
A. In this I would assume it is resting in the front in an
area where we cannot see it. It is possible that it was
cut away before those photos were taken.

Q. What was cut away?
A. The hyoid bone separately. But I truthfully don't remember. I normally do not do that.

Q. I thought you said, "I cut the hyoid bone away separately." Didn't you testify that way under oath?
A. I don't recall if I said separately because I normally don't do that.

IO: Mr. Zimmermann, what I'm going to do for the record is I'm marking the photograph that you have given me as IO Exhibit Number 33, which is a stack of photographs; and I'm marking this as 65a of 79.

CC (MR. ZIMMERMANN): Great, sir. Then we'll know it goes from 65. Thank you, sir.

You don't remember which way you testified?

WIT: Not in terms of separating it out from the rest of the larynx. I normally do not do that so I would expect I did not say that.

Q. Don't remember?
A. I don't remember exactly what I said. I know what I would be thinking because I normally don't separate it away.

Q. Let's forget what you said, and let's go to what you did. You came to the conclusion that that little tiny little bone that floats up there on top of the ligaments on top of the larynx was the cause of the man died?
A. That is correct.

Q. And you didn't cut it away so that you could take a picture of it so that you could prove that what you found was true later on. Why not?
A. Maybe I'm not being clear. I did excise the hyoid bone from the neck complex. And usually it would be attached to the laryngeal complex.

Q. My question to you is that with the importance that it had to your findings, why didn't you cut it apart separately and photograph it separately to show that it's fractured?
A. Basically -- first when you examine this yourself at autopsy, you see a finding that you're very confident of -- and in particular in this case with a second

pathologist, you're not thinking of the fact that it would be necessary to absolutely see this. Normally we are believed when we discuss what we saw at autopsy. Now --

Q. Well, I'd think --

IO: Hold on. Let her finish.

WIT: When I do dissect out the neck complex, I normally have the hyoid bone in there when we're taking the photos. Essentially I would have assumed that the hyoid bone would be there. But normally I would not dissect that out separately. I never have. So it just would not be something I would do. I don't see any benefit to that, especially when there's something that is not a difficult thing to see grossly when you're there.

Q. Well, let's talk about when you photograph things or when you examine things separately. You said since it wouldn't be hard to prove, couldn't we say the same thing about you observed the contusions and yet to prove that there really were contusions, you made incisions. And we saw photographs of that. There's one photograph that had three separate incisions, on the back, on the thigh, and behind the knee. Do you remember that one?

A. Uh-huh.

Q. You did that so you could prove that what you thought were bruises or contusions really were and they weren't post-death injuries. Do you remember that?

A. Yes. And certainly when there is a question of making sure with the postmortem decomposition that it's not artifact. That's when the photos come in helpful. But when it is something that you have no question about, it's not something you always think of it being necessary to autopsy; and, in fact, I often don't -- I'm sorry -- photograph. I often don't photograph those things that I'm very confident about.

Q. Even if it's the cause of death in your opinion?

A. Yes. That's correct.

Q. Wouldn't it be prudent that if there was a cause of death that you could limit to one specific thing, like, apparently you're doing here, that it would be better to have a picture to show somebody?

A. It would be good, but it's actually unusual. I take

more photos than most of the population. It's not that cost effective, especially in the civilian community, to take as many photos as we do.

Q. Not even on the cause of death?

A. No. It's not necessary because if it's something I see and can attest to --

Q. Something that you see and you'd put down in your report and then we would have it and there would be no dispute about it. Correct?

A. That is correct.

Q. What do we do in a case, Doctor, when we have a report that says the larynx, trachea, and bronchi show no abnormalities. And then you come in at trial -- or at the hearing and testify differently from your report. Wouldn't it be great to have a photo to show that there were not abnormalities?

A. Yes. And the those -- the abnormalities as they apply the larynx themselves do have photographs. And the abnormality of the larynx itself is essentially the blood that is tracking into the perilaryngeal space.

Q. And that could have been caused by a very strong individual grabbing somebody by the area of the neck and putting four fingers there and squeezing as hard as he could for several seconds and causing that tissue to hemorrhage just like tissue hemorrhages from blunt force and all these other contusions that you talked about it, it would result in something that looked very much like that, maybe not the same, but looked very much like that without the hyoid bone being broken. Right?

A. No. I disagree. That hemorrhage came from the hyoid bone being broken.

Q. Where is that hyoid bone today?

A. That hyoid bone was with the tissue that essentially was not destroyed, but that was ruined. And after that the -- whatever we could recover of that, which included the hyoid bone went to the Armed Forces Medical Examiner's facility.

Q. So there's some place we can go look at that hyoid bone today? Where?

A. At the Armed Forces Medical Examiner's facility at the Armed Forces Institute of Pathology in Washington, D.C.

- Q. Okay. Did you take a picture of the (b)(6)
- A. No, I did not.
- Q. Why not?
- A. For the very same reason. Generally, I tend to take few pictures of the internal organs, especially when there's blood involved because there is such a great deal of artifact -- not artifact, but much can appear like artifact because of the blood, and photographs can easily be misinterpreted or do not represent what it is you're really trying to show. So in this case, I took more photographs internally than I would normally. Once again, fractured ribs are very obvious, very easy to detect. It's something you're confident of. And with the hemorrhage, and there was no need for photos.
- Q. (b)(6)
- A. (b)(6)
- Q. Don't you think that would have been something important to document to try to find out why somebody died?
- A. No, for the very same reasons I just said. First, they are subject to misinterpretation; second, when you're very confident of what you see at autopsy and can describe those things, no, photos are not necessary.
- Q. If -- you would agree that they would have a different reaction on a person if his rib were broken all the way through than if a rib just had a crack in it. Correct?
- A. It would have a different effect on the person? It would be less significant in terms of interfering with respiration, and you'd have -- more likely to damage the nerves in that area. The completely fractured ribs would be likely to be more painful than those that are just cracked.
- Q. Okay. I'm going to move on. After this, I want to ask you one more question that's been marked as 65a, the picture of the larynx that you reported as having no abnormality. The airway is where?
- A. The airway would be right on the inside up in there [indicating].
- CC (MR. ZIMMERMANN): And so that counsel know and so the investigating officer knows, if you look at the top of the photograph, there is a little -- it looks like an

indentation -- that's the airway inside in the back of that, this membrane-type thing there. Right? That's not the exact scientific name of the membrane --

WIT: Well, once again, this is one of the reasons I don't take the pictures because they are very difficult to see what you're looking at.

Q. Well, I'm just asking it for the very basic thing, where's the airway? It's right there in the back; isn't it?

A. Yeah, actually, looking at this photo which is much better, it does look like this is the back. This is the back of the esophagus. And this would be the airway.

Q. (b)(6)

A.

Q.
A.

Q.
A.

Q. Because the airway was normal postmortem; wasn't it?

A. Normal, except for what could either be decomposition changes.

Q. Are you saying that if someone is injured anywhere along the airway path to the point that the swelling shuts off the airway so that one dies from asphyxiation from lack of oxygen to the brain, that when you die that swelling won't stay in place?

A. That is true. Not in all cases, but yes, oftentimes you do not see the swelling from that.

Q. I thought when you die, you die. And I'm not trying to be funny. When you die, everything stops. The heart is not beating anymore. I think we established that?

A. Yes.

Q. And there is no more blood going so there's no more hemorrhaging and there's nothing more to swell, but

- you're saying the reserve is now true, that swelling then shrinks back after death?
- A. Swelling in the airway in the larynx when you are looking at laryngeal edema, yes.
- Q. Explain how that happens.
- A. I don't know the mechanism why, but the skin contracts, you'd lose the fluid in the tissue. It happens. It's a known event. And so looking grossly at the airway, you cannot tell whether there had been swelling or not.
- Q. Can you tell whether there'd been swelling -- I'm sorry.
- A. Oftentimes, you cannot.
- Q. Well, how did you tell there was swelling in this case? You just testified that's what caused the death.
- A. What I said is that it was impossible for me to say whether it was actually there. There was a suggestion of it, but because we don't often see it postmortem, we can't always tell if it had been there or if it had not been. That's correct.
- Q. Okay. It's 3:30, and I'm tired so I want to make sure I just heard what you said.
- A. Okay.
- Q. Did you say it was impossible for you to tell if there was swelling in this case?
- A. Not impossible. I just wasn't sure.
- Q. I thought you said it was impossible for me to tell. Isn't that what you just said. Do you want me to have the court reporter read it back?
- A. It was impossible for me to tell if it had been or if it had -- had not been there. That's correct.
- Q. Then how can you state to a reasonable medical certainty that this injury caused swelling sufficient to block the airway and cause this man to die from asphyxiation? How can you say that?
- A. Because this is a known mechanism that occurs with that type of injury to the hyoid bone fracture. And in the absence of any other plausible cause of death, this would be a likely thing given the type of scenario that is presented.
- Q. All right. I'll come back to that in a minute.

I'd like to mark the investigating officer's exhibit next in order.

IO: That's number 37.

CC (MR. ZIMMERMANN): I'll show it to the investigating officer, and I'll show a copy to the witness.

Doctor, this is a copy of a communication that the government gave us from a Captain David B. Ashe, USMC, reportedly the SJA of 2/5, Governance Support Team, and he describes the autopsy.

Have you seen this document before? Have you seen this document?

WIT: No, I haven't.

DC (1STLT FOLK) (1STLT FOLK): Was that 37, sir?

IO: Thirty-seven.

CC (MR. ZIMMERMANN): I'll offer 37 by the way so we don't read from something that's not in evidence.

IO: Any objection?

TC: Yes, sir. Relevance, sir. Why is this relevant to her testimony? I mean, this is what Captain Ashe may or may not have said. But we don't know.

IO: I haven't read the document, so I don't know what it says. I don't know if it's relevant or not, but --

TC: I mean, she cannot authenticate that this is what Captain Ashe actually wrote or these are his opinions. She only can say what she said and what she did during the autopsy.

CC (MR. ZIMMERMANN): Do you want a response?

IO: I would.

CC (MR. ZIMMERMANN): 405 permits the defense to put in an unsworn statement. And there are very little restrictions of what the defense can put in at an Article 32.

The authenticity of this document is supplied by the fact that it was provided in discovery from the United States Government. They sent it to us.

IO: Well --

CC (MR. ZIMMERMANN): So they sponsored it.

TC: We'd like to know who from the United States Government gave it to him. I mean, that's a lot of people.

CC (MR. ZIMMERMANN): It was the discovery package that we have. It was your co-counsel.

IO: We're not going to argue about this.

CC (MR. ZIMMERMANN): I was answering the question of where it came from. That's a legitimate question.

IO: Let's take a recess here. I'm going to read the provision that you have cited, 405, and we'll see.

So we're going to go off the record. We're in recess in place.

The Article 32 investigation recessed at 1528, 27 January 2004.

The Article 32 investigation was called to order at 1540, 27 January 2004.

IO: This Article 32 is called back to order. All parties who were present when the court recessed are once again present. Accused and counsel are present.

We were in recess and off the record for several minutes, now, about 12, from 1540 to 1542, to discuss the admissibility of IO Exhibit Number 37 which is being offered by the defense. IO Exhibit Number 37 purports to be an e-mail of some sort or a document or a statement prepared by Captain David Ashe, United States Marine Corps, who was in country in Iraq at the time and was present at the autopsy performed on 10 June. And this document appears to be observations that he has made at the time of the autopsy.

In my view it is relevant, and since it's being offered by the defense, there's, obviously, no objection to it; and under R.C.M. 405(g)5(A), it is admissible regardless

of the availability of the evidence as the rule is written. Captain Ashe is not presently available. As I indicated during the recess, I'm going to allow it. How much weight I give it due to the fact that Captain Ashe not a doctor and not present to be cross-examined on this statement, I may not give it a whole lot of weight, but I'm going to allow it.

CC (MR. ZIMMERMANN): Thank you. In view of your last statement with regard to the weight, I've been informed by detailed counsel for Lance Corporal (b)(6) that the recipient of this is two doors down. So maybe at some point in the 32, we'll call him and belay any fears you have about the integrity of Captain Ashe.

IO: The recipient of --

CC (MR. ZIMMERMANN): Of the -- this is the second page of an e-mail report through the command to the SJA of the MEF. And I think it's a Major --

DC (1STLT FOLK) (CAPT STUDENKA): Major Lore, sir, is the OIC of legal assistance, which conveniently just moved two buildings down.

IO: Right.

CC (MR. ZIMMERMANN): So he was the recipient. And if there's any question in your mind about how much weight to give to Captain Ashe's report of what he saw, not his medical findings, but what he's reporting that was said. But that's for another day.

IO: Well, I don't really care how much weight Major Lore gave it as the recipient of the e-mail. It's up to me to decide what weight I'm going to give it.

CC (MR. ZIMMERMANN): Okay. All right. Are we back on the record, and may I proceed?

IO: We are. We've been on the record.

CC (MR. ZIMMERMANN): May I proceed?

IO: Yes.

Questions by the civilian counsel (Mr. Zimmermann):

Q. All right. Now, since we had all this recess, let's go back and set the stage here. You had a number of visitors or observers in the autopsy you performed. Am I right?

A. That's correct.

Q. Okay. I'm not going to go through all the description. If you want to, we can where he describes what happens in the autopsy. This is just his report to his boss. He's not making any medical conclusions. But in the conclusion of the autopsy when he puts the time that it concluded and what the doctors' conclusions were, he states, They will likely not indicate homicide on their autopsy report because of the inconsistent evidence and lack of any defense injuries, but their, quote, hunch, unquote, says, death by strangulation.

Did I read that right?

A. According to what I can see, yes.

Q. Is that what you all talked about, there, in the autopsy room?

A. In a sense what we were talking about is what I would put on the preliminary report. Because I work for, professionally, for the Armed Forces Medical Examiner, oftentimes particularly in cases such as homicides, and a certain percentage of my cases -- those cases go to them for quality assurance review which is fairly typical in the forensic community.

Usually before you come to your final conclusions, you will also consult with them, in which case I consult with the Armed Forces Medical Examiner, having already consulted with Colonel (b)(6) [ph] who agreed that this was strangulation. But the key factor is what I actually put into the preliminary report. And I was hesitant to do so not having direct communication with the Armed Forces Medical Examiner, who, essentially, I perform the autopsy for, under his authority under the law.

Q. Okay, doctor.

A. So the question was, were we going to go definitive right away, or were we going to wait and follow our standard procedures because we did not have communication with Dr. (b)(6)

And I indicated, although I suspect once that we all talked, it's going to end up being a strangulation and a homicide.

Q. Okay.

A. And just to make note in what you have shown me here, I will say that there was quite a bit of paraphrasing of what our discussions were in terms of the more technical terms. And clearly he was a lawyer with no forensic medical experience unlike yourself, sir.

Q. Like me?

A. Now, I think you sound very reasonable. This was worse.

Q. There's somebody worse than me?

A. There's a lot of incorrect paraphrasing on that. But what they were referring to the preliminary report, and it is basically our following standard procedures which we were unable to do because of the communication difficulty.

Q. Do you take issue with this statement from Captain Ashe when he's reporting what you guys -- excuse me -- what the doctors were saying. Stated they are certain (b)(6) was strangled. You don't have any issue with that; do you? Stated they are certain (b)(6) was strangled, but are not certain that the strangulation was the cause of death. Are you disputing that? That you-all didn't say that?

A. I take issue with it because it doesn't make sense.

Q. But he didn't -- he inaccurately wrote down what you said?

A. Yes. That is incorrect and paraphrased. And paraphrased in the sense that it's not getting the true meaning of what was conveyed or what our meaning was in the things that we were saying.

Q. Okay. And then this -- how about this? Is this also wrong? They will likely not indicate homicide on their autopsy report because of the inconsistent evidence and lack of any defensive injuries. Did he report that incorrectly to?

A. Yes. That is incorrect.

Q. But their hunch says death by strangulation. Is that inaccurately reported also?

A. Essentially, hunch or -- I don't know what their term

would be. Hunch is a word I probably would not use. But, yes, our inclination was that this was death by strangulation pending quality assurance review and consultation by the Armed Forces Medical Examiner.

Q. Okay. So you didn't tell them that you couldn't determine that strangulation was the cause of death to a reasonable medical certainty?

A. At that point of time, I would have wanted to look at the rest of the case. I would have wanted to look at all the toxicology, the microscopic studies, put the whole case together, and then at that point in time when everything was together then that's when I'd become with reasonable medical certainty that's what we have. But it was too premature at that time.

Q. Let me ask the question again because maybe it wasn't clear. This is a yes-or-no answer question. Did you or did you not tell them that you couldn't determine that strangulation was the cause of death to a reasonable medical certainty, there, in the autopsy room that day. Did you say that or not?

A. I don't know. I could or not. I don't recall it.

Q. Why do you say you could have then if you don't recall?

A. Because with reasonable medical certainty, I would not be at that time at the basis because I didn't have the complete evidence in all of the investigation I needed for the case.

Q. Then Captain Ashe's report is accurate, then?

A. Not in -- I would not call that accurate on the basis of what he is saying.

Q. Okay. Let's move on. Do you recall our testimony earlier about the young female -- I say, young -- there was a female NCIS (b)(6) was she young?

A. Yes.

Q. Okay. Young female NCIS agent. And she was there also. Correct?

A. That's correct.

CC (MR. ZIMMERMANN): I'd like to offer under the same provision of the R.C.M. --

IO: Thirty-eight.

CC (MR. ZIMMERMANN): Thirty-eight. Investigation Officer Number 38, and approach the witness.

IO: Has trial counsel seen this?

CC (MR. ZIMMERMANN): Yes, sir. We got it from the trial counsel.

IO: I mean, do they know what 38 is now?

CC (MR. ZIMMERMANN): Yes, this morning --

IO: You got a lot of stuff from them. All right.

CC (MR. ZIMMERMANN): We offer that into evidence under the same rule. It's the NCIS agent's report of the autopsy from Special Agent (b)(6)

IO: Okay. It will be admitted.

Any objection? I assume there is.

TC: No, sir.

Questions by the civilian counsel (Mr. Zimmermann):

Q. Pretty sure you haven't seen this. Right, Doctor?
A. No.

Q. Because you haven't, let's look at this and it describes how they got you there so forth and who was present. And they said that you were present. That's correct. Right?

A. That's correct.

Q. Staff Sergeant (b)(6) Is that correct?
A. That's correct.

Q. Colonel (b)(6) Is that correct?
A. That's correct.

Q. Doctor (b)(6) Is that correct?
A. That's correct.

Q. Captain Ashe. That's correct? The Marine?
A. Yes.

Q. And Captain Schweigert, the Army lawyer?
A. That's correct.

Q. And then she describes the same things. And then she has summary of preliminary findings of the medical examiner.

Doctor (b)(6) reported that (b)(6) hyoid bone was fractured on the right side. That's correct; isn't it? Did I read that right?

A. That's correct.

Q. And that is what you found; isn't it?

A. No. Wait a second. I'm sorry.

Q. Dr. (b)(6) reported that (b)(6) hyoid bone was fractured on the right side.

A. That's correct.

Q. Dr. (b)(6) further explained that the hyoid bone is located in the neck and went on to say that the fracture of the hyoid bone is consistent with manual strangulation. That's what you testified to today too. Correct?

A. Correct.

Q. Dr. (b)(6) stated that she has, quote reasonable certainty that he was strangled to death; however, she was unable to state with, quote, reasonable medical certainty that strangulation was the cause of death, unquote. Did I read that right?

A. Once again, I don't recall exactly what was being said, but --

Q. My question was, Did I read that right?

A. Oh, yes.

Q. And that NCIS agent was there taking notes, and she's a trained investigator. Do you challenge that that's not what -- that what she puts in quotes, that that is not what you said?

A. No.

Q. So you accept this as being accurate?

A. Um, yes, I do.

Q. Okay.

A. And that was, of course, before we got the toxicology results back.

Q. The toxicology results? How do the toxicology results impact your findings?

A. Well, in the absence of anything else, yes, we could say this with reasonable medical certainty. But the toxicology, you know, how do we know he didn't take something that could have killed him.

Q. And so you were going to wait until you got -- well, you didn't know then that they were going to blow up on the Tarmac. Right?

A. We were dealing with preliminary findings based on what we had. And in terms of the final report, you know, essentially, that's when we would be dealing with the reasonable amount of certainty. But we were at the preliminary stages at that point.

CC (MR. ZIMMERMANN): Mr. Investigating Officer, you have a certificate of death already in evidence; do you not?

IO: I do.

CC (MR. ZIMMERMANN): What number is that?

IO: That number is 32.

CC (MR. ZIMMERMANN): Can I just check to make sure it's the same thing?

All right. I'm on Investigating Offer's Exhibit 32. I'm showing it to you, Doctor.

This is in evidence as the certificate of death. Correct?

WIT: Correct.

Q. You've seen this before?

A. Yes.

Q. Counsel for the government showed it to you. You authenticated it. Signed by you?

A. Correct.

Q. Is that your signature there?

A. Correct.

Q. And you dated it 10 June 2003?
A. That is the time when I did the written death report, yes.

Q. Okay. That's the same day that you did the autopsy?
A. That's correct.

Q. And you put the cause of death or the disease or condition directly leading to death, you put strangulation there?
A. That's correct.

Q. And a homicide?
A. That's correct.

Q. Okay. And that is the official certificate of death?
A. That is the official certificate of death, unless it is amended later when other findings come in and the actual case is finalized out, yes.

Q. Was there ever an amendment to this certificate of death?
A. Not this one, no.

Q. And you issued this opinion in writing and the certificate of death on the very day of the autopsy?
A. Yes. And that was after consultation with the Armed Forces Medical Examiner. This was written a few hours later after the autopsy.

Q. Okay. So that happened -- So you didn't wait for the toxicology report, then, for the certificate of death?
A. We have to have a certificate of death. It's a transportation document used in the military. And because of that, we go ahead and put what our prevailing thoughts are and then should it turn out otherwise, then amendments are used --

Q. And if you other wrong you change it later?
A. -- but these essentially are transportation documents in our military system.

Q. So even though your testimony was a few minutes ago that until you got the toxicology report back you couldn't state what the cause of death was. You talked to the medical examiner, I take it, on the phone a few hours later. You issued an official certificate of death?
A. Not in those words. Yes, I know what I was feeling was

the cause of death. But we were talking about reasonable levels of certainty, reasonable medical certainty, we think this is what it is. But, yes, reasonable medical certainty would be after you get everything. Prior to that we're looking at this looks reasonably like this is the cause of death. And that's how we would sign the death certificate.

- Q. Is that what that says, This looks reasonably like it, or does it say that's what the cause of death is?
- A. No this is the thought process which you're trying to -- I'm assuming based on the statements that were made.
- Q. You were in Talil Air Force Base in Iraq?
- A. That is correct.
- Q. And the fellow -- or the woman that you were talking to was in Germany?
- A. What woman?
- Q. A man or --
- A. Are you talking about Agent (b)(6)?
- Q. No. Whoever you conferred with that allowed you, a few hours after the autopsy, to sign the certificate of death? Didn't you say you conferred --
- A. The Armed Forces Medical Examiner in Washington, D.C.
- Q. You actually talked to D.C. from Iraq?
- A. Yes, I did. After -- not at the time of the autopsy, but when we went back to where our equipment was located, we had Sat phones and we were able to discuss the case.
- Q. Let's talk about another way to cause strangulation. We talked about the mechanical interruption -- or compression. There's another way, and that's to compress the corroded arteries. Correct? Cut off the flow of blood?
- A. That's correct.
- Q. That's another way you can strangle someone. Right?
- A. That's, basically, one of the more common methods that we see.

Q. And when you compress those corroded arteries and cut off the flow of blood even for 10 to 20 seconds, the person will become unconscious. Correct?

A. That's correct.

Q. And if you keep continuous pressure for six or seven minutes, what happens? Death. Right?

A. That's correct.

Q. Do you think that happened in this case?

A. Not based on the scenario that I was given.

Q. What scenario that you were given?

A. Of -- the scenario of the decedent being conscious afterwards and alive for a period of time after the incident.

Q. What do you mean? The decedent being conscious after what?

A. After the dragging incident that could have resulted in the fractured hyoid bone.

Q. And when did you learn that?

A. This was something I learned recently also.

Q. You didn't know that before you reached your conclusion?

A. No, I did not.

Q. All right. Because you do have no mention of tongue protrusion in the autopsy report, I take it that that meant that your findings about the tongue were normal. Is that right?

A. Aside from whatever decomposition processes.

Q. Okay. You normally would -- if you said there were abnormalities, if there was some decomposition, you'd say decomposition, but that's not what you mean --

A. It depends on the degree of it. If it's severe, I will say that. If it's not --

Q. You didn't find any tongue protrusion in this case; did you?

A. I don't believe so, no.

Q. All right. Now, you were shown a series of photographs taken by the NCIS.

Can you see that with the light on, or do you want me to get you a photograph instead of this blow-up?

A. I can see it.

Q. What I want you to ask you about -- you described discoloration to the abdomen as a contusion.

IO: What exhibit is this now? IO 9?

CC (MR. ZIMMERMANN): Sixteen of 17. Yes, Exhibit 9, 16 of 17.

Do you recall that?

WIT: Yes, I do.

Q. And this area right in here -- and I'm pointing for the record to the abdominal area around the belly button.

A. Uh-huh.

Q. Now, you didn't see that body in that condition because that was taken days before the autopsy. Right?

A. That correct.

Q. When you saw it, the stomach was bloated? You reported that. The abdominal area was protuberant and bloated. Is that what you put?

A. That's correct.

Q. All right. And this was taken within 24 hours of the death, but it also was taken -- if I told you this was taken when the deceased had been dead and never refrigerated up to this point and the temperature was about 120-degrees and he was in a body bag stuck in a closed unrefrigerated refer, or container, with a bunch of other bodies, wouldn't you agree that that discoloration would be the first signs of decomposition in the abdominal area? Yes or no?

A. That's not normally what I see in the abdominal area with the first signs of decomposition.

Q. What do you see?

A. Usually we see greening of the abdomen in the area starting low up around the intestines.

Q. You see what in the abdominals?

A. Greening.

Q. Greening?
A. Green discoloration. That's not what I normally see. And I see bodies at all different levels of decomposition, particularly since so many travel to us for periods of time.

Q. Okay. So you disagree that that's a postmortem change?
A. Yes, I do.

Q. Would you agree with me that a severe bacterial infection would cause diarrhea?
A. Yes, that's correct.

Q. Were you told that this deceased person had three bouts of severe diarrhea within about -- approximately eight hours before he was found dead?
A. Yes, I was aware of that at the time of autopsy.

Q. What impact did that have on your findings?
A. Well, one of the considerations that you have to give a case like this particularly in this scenario would be dehydration from severe diarrhea and also electrolyte imbalances.

Q. And what did you do to check for that?
A. Normally we would check the moistness of the mucosa, skin --

Q. I'm sorry. Speak up.
A. Moistness of the mucosa; we would do vitreous electrolyte studies. In this case though with the decomposition --

Q. Couldn't do it?
A. Couldn't do it.

Q. Because some of the stuff you'd want to do under a microscope. Right?
A. That's correct.

Q. And that stuff blew up?
A. That's correct.

Q. And you couldn't get it -- when they went back and dug him up not again -- or dug him up, not only had -- he had now been dead for a month, but he had been in that hot ground in sand from June 10 to July 3 when they dug him up. That certainly had to have some bearing on the

reliability of any type of specimen that was taken out for analysis at that time. Correct?

A. For microscopic examine, yes.

Q. Now, if a person has a severe bacterial infection and it's severe enough to cause a person to have three explosive-type bowel movements in that short of period of time, it could cause GI bleeding. Correct?

A. That's correct.

Q. And a GI bleed is bleeding, internal bleeding within the gastrointestinal system. Do you agree?

A. Yes, that's correct.

Q. I mean, that's just so we're talking about the same thing.

A. Uh-huh.

Q. And when one has a GI bleed, one way to determine whether or not that condition exists is if you look at the stool.

A. Uh-huh.

Q. And if the stool is dark in color and a particularly foul stench, that's an indication of decomposing blood. Do you agree with that?

A. That's correct.

Q. Because when blood decomposes, it changes the smell to a really foul stench. Correct?

A. That's a good way to put it.

Q. Well, what I want to do is to distinguish the smell which is not pleasant in the first place. It is even more unpleasant because of the decomposing blood. Am I right?

A. Well, not just because of the decomposing -- when you have decomposition, you have decomposing blood, and, yes, that does not smell good.

Q. I think --

A. So I'm not sure what you're referring to.

Q. Okay. I think I'm not being clear. It's my fault. Let me back up.

If a person is alive and has a severe bacterial infection, so severe that he's having three explosive-type bowel movements in a short time span, that's an indication of a severe bacterial infection. Correct?

A. Not always, but, yes, with severe bacterial infections you can have explosive defecation, diarrhea.

Q. And if you have a severe bacterial infection that is severe enough, it will cause a GI bleed. I think we've already been through this. But I want to back up.

A. I can, yes. Okay.

Q. Now, you're still alive, you have a GI bleed, you excrete the feces, if it's dark in color and has a horrible stench to it, that's probably the result of that blood in the intestinal tract decomposing. Agreed?

A. Well, or the results of bacteria. It's not necessarily the blood that is causing the odor. Blood will darken when it's old. Yes, you get a GI bleed in your abdomen, and, yes, it will turn very dark. But the cause of the stench is not the blood causing the stench, it is the bacterial infection --

Q. Okay.

A. -- that you may or may not have, or you can have a stench, you know, with other causes of diarrhea.

Q. Now, you performed a normal Y-incision on this autopsy?

A. That's correct.

Q. That for -- I'm not sure what the investigating officer's background, so I may be asking questions that are basic. And if I am, Mr. Investigating officer, just say, I already know that stuff.

IO: I know what a Y-incision is.

CC (MR. ZIMMERMANN): Sir?

IO: I know what that Y-incision is.

Q. Okay. That bottom part of the Y-incision goes down through the umbilicus. Correct?

A. That's correct.

Q. Through the abdominal wall. Correct?

A. That's correct.

Q. I mean, that's the whole purpose, to take out the internal organs and examine them. Right?

A. That's correct.

Q. It goes basically from under here [indicating] down through to somewhere, about, say, in here [indicating]. Correct?

A. That's correct.

Q. In other words, it's going to go right through that area that is discolored?

A. That's correct.

Q. In this case, because you did the normal Y-incision in this case. Correct?

A. That's correct.

Q. But your report doesn't indicate any examination of the tissue underneath the outer skin when you did the Y-incision through the abdominal area; does it? Do you want to look at it? Do you want to look at your report? It's sort of unfair to --

A. You're talking about the panniculus, the subcutaneous fat underneath the incision.

Q. Right.

A. Yes. It would not have -- essentially, I would not describe that normally.

Q. Because?

A. Unless it was grossly abnormal.

Q. Right. If there was something wrong with it -- if it wasn't normal, you would do what you did -- and I'll put them back on if you want -- do you remember that slide where you got the cuts in the back and behind the knee and on the thigh?

A. Uh-huh.

Q. It's because you had discoloration there, you wanted to find out if there was hemorrhaging or if it was postmortem. Correct?

A. Well, I was also considers the possibility of rhabdomyolysis, and what I was mostly doing was looking at the more severe contusions, bruises, to be looking if there might be any significant muscle damage or necrosis from these types of bruises as I have seen in the past with these kinds of cases that can lead to a cause of

death. So mostly the majority of the incisions we made were to decide how bad the muscle necrosis -- and it also tells you if the bruises were antemortem or postmortem.

Q. And you relied on that on these other parts of the body to determine whether or not it was discoloration from decomposition or discoloration from premortem -- or antemortem injury. Correct?

A. That's correct.

Q. But you did not do that for the abdominal wounds -- excuse me. The abdominal discoloration?

A. No. That was not the purpose of the Y-shaped incision.

Q. No. But all you had to do was just look at it, and if you would have found hemorrhaging there when you did the Y, you would have put that it was from bruising and you would have supported it by your conclusion of hemorrhaging -- or your finding of hemorrhaging like you did all these other places where --

A. Well, no. Because I actually included that in the evidence of injury because I felt that was a real bruise. And so that section, that is where I noted that.

Q. In the what section?

A. In the evidence of injury section.

Q. I'll show you this if you don't remember it because I don't expect you to remember all this. Do you want me to do this up there with you so that you can look over my shoulder?

A. Yeah, I should probably look at it to refresh my memory.

Q. Okay. You're describing the extremity injuries?

A. Okay.

Q. And when you get through describing the cuts and lacerations to the wrists and fingers and so forth, you start saying, "multiple irregular abrasions in associate --

IO: So the record is clear, what are you showing her right now?

CC (MR. ZIMMERMANN): I'm showing her the autopsy report.

IO: IO Exhibit 30.

CC (b)(6): Yes, sir.

IO: What page?

CC (MR. ZIMMERMANN): I'm on the bottom of page 4, and then continuing on the top of page 5.

IO: Got it.

CC (MR. ZIMMERMANN): And let me go back, and we'll start on 4. Multiple irregular abrasions in association with red/purple contusions covering both anterior knees. Did I read that right?

WIT: That's correct.

Questions by the civilian counsel (Mr. Zimmermann):

Q. All right. The back of the left knee has patchy irregular blue/purple contusions in association -- am I going too fast for you?

A. No.

Q. No. I'm talking to the court reporter. She's smiling so I'm good.

(b)(6)

A. Because it was prominent, yes.

(b)(6)

Q.

A.

Q.

- A. Okay.
- Q. Right. Now, on your torso injuries -- on page 4, Mr. Investigating Officer, under B -- excuse me. E2A -- when you're describing the abdominal contusion -- or what you claim is a contusion -- you just say an 8 by 6-inch irregular red/purple contusion is centered over the umbilicus on the mid lower abdomen. Right, is all you say?
- A. Yes.
- Q. And you had cut right through that area. You didn't have to make another cut. You cut right through that area. All you had to do is say, supported by subcutaneous hemorrhaging, if, in fact, that really was a contusion and not discoloration from decomposition?
- A. When I describe contusions, normally, your standard relatively superficial contusions, I just describe it by shape or regularity and color. And I do not mention the underlying subQ. When it goes deeper than, say, quote, normal bruises like you fall down and you get a bruise. When it goes deeper than that and it's actually way into the subcutaneous tissue, then I feel it is significant enough to mention in the report. And then when it goes deeper down into the levels of the muscle, I will also notate that. And what I am basically doing -- and the difference of what I described are different levels of severity.
- Q. So what you're saying then is when you -- your testimony to the government counsel was that you really didn't -- weren't sure of that until you saw the photographs when you came here to Camp Pendleton that the NCIS had taken because you thought that perhaps that discoloration that you saw in autopsy may or may not have been a contusion. You only became sure about it when you saw the NCIS photograph?
- A. No. Actually that's incorrect. What I was not sure of was the bruising that was higher up around the ribs. I believe that was on the right side. That was the bruising that I did not, quote, appreciate or see at the time of autopsy. However, at time of autopsy, I did see the bruise, here, which turned out to be a relatively superficial bruise relative to the other ones. And so that accounts for the different descriptions on the report.

Q. When you and the IO were having this discussion about the meaning of the word "appreciate," is it your memory that you were not talking both about the discoloration in the nipple area and the discoloration in the belly button area; you were only talking about the one up by the chest?

A. That is correct. And also there's some bruising on the face that I did not appreciate at autopsy, but I did see on the NCIS photos.

Q. Let me ask you this. This is just for curiosity. If you have these descriptions -- you described for example -- let me use this one. You described --

CC (MR. HIGGINS): Which photo is it?

CC (MR. ZIMMERMANN): This is 17 of 17. I think it's IO 9.

Do you see this? This is what you just said, the one around the nipple?

A. That's correct.

Q. Okay. These are the NCIS photos. You know, there's nothing about these two marks, right here, in your autopsy. See these really -- what look like pretty severe stuff right here [indicating]? Do you see what I'm talking about?

A. Uh-huh.

Q. Let me show you. Do you see these? They don't appear in your autopsy report at all?

A. And because -- if that is the case, I'm assuming that's because I did not appreciate those. The only thing that I recall appreciating was this bruise around the abdomen.

Q. If you were looking for abuse of the body by bruising and contusion and blows all that stuff and you picked up this and this, why would you not be curious about these obvious abrasions, here, that look like they have even scabbed over? Right? Don't they?

A. So I'm not sure what you're asking me.

Q. Why did you think those were normal and not mention it?

A. At autopsy, I'm assuming if those were not mentioned, I did not appreciate or I did not see those at autopsy as well.

CC (MR. HIGGINS): For the record those are two marks underneath both nipples and centered near the sternum.

CC (MR. ZIMMERMANN): Yes.

CC (MR. HIGGINS): Thank you. Sorry, Jack.

WIT: And it's not clear whether or not those were abrasions or bruises.

Q. What is that?

A. Those actually look from here more like they might have been abrasions.

CC (MR. HIGGINS): What photo was that? I'm sorry.

CC (MR. ZIMMERMANN): It's the same one. This is 11 of 17.

CC (MR. HIGGINS): Thank you.

CC (MR. ZIMMERMANN): IO 9, I believe.

How did the hyoid bone get broken?

WIT: I'm sorry. How did the what?

Q. How did that hyoid bone get broken?

A. Assuming he was not in an high impact motor vehicle accident this would have been through the process of strangulation. Most likely, most often, when we see this is with manual strangulation with the hands.

Q. So someone in your opinion would have had to strangle him with his hands to break the hyoid bone like that?

A. That's correct.

Q. If someone had his hand around someone's chin and the hand never touched the neck and there was force applied to slide someone along the ground without ever touching the neck, that would not break the hyoid bone; would it?

A. You would need direct contact with the level of the hyoid bone.

Q. It would have to have direct sufficient force to crack that bone?

A. That is correct.

Q. Applied directly on the bone?

A. That is correct.

CC (MR. ZIMMERMANN): Yes. I keep forgetting.

The record should reflect that (b)(6) put her hands on her throat at approximately her Adam's apple. Is that accurate?

A. Just above it, yes.

Q. Let me show you this diagram so we can place that hyoid bone. Would you agree with this drawing -- and this is not in evidence, but I want you to make sure it's accurate first. This would be the hyoid bone up here attaching ligaments attaching it to the what? What do we call this?

A. The thyroid cartilage.

Q. The thyroid cartilage which would be the greater horns back here [indicating]?

A. Yes. In the back.

Q. Or right here [indicating]?

A. Greater end, yes.

CC (MR. ZIMMERMANN): So perhaps I ought to introduce this in evidence so that the investigating officer can see it while we're talking.

IO: Thirty-nine, IO Exhibit Number 39.

CC (MR. ZIMMERMANN): I offer this into evidence.

IO: Any objection?

TC: No, sir.

CC (MR. ZIMMERMANN): Just so we can all see what we're talking about, the hyoid bone -- this is if a person were standing upright. Correct?

WIT: Correct.

Q. And we're looking at him or her toward her face. Correct? This is the front of her neck.

A. That's correct.

Q. Let's use "he" since we're talking about a deceased male.

A. This is your thyroid cartilage?
That's correct.

Q. Greater horn. And here's your hyoid bone?
A. That's correct.

Q. Connected by ligaments?
A. Yes.

Q. Now, isn't it true on photos that we were showing earlier, the ones that your report said have a normal larynx, and you said showed swelling. Are you with me on the photo? The one I had a little photo of?
A. Yes.

Q. What really happened is that you dissected that, and your cut went through here. And got what you were showing --

IO: You're going to have to describe this for the record because --

CC (MR. ZIMMERMANN): For the record I am on Investigating Officer 39, and I am running a pen between the hyoid bone and the top of the thyroid cartilage.

IO: Why don't you do me a favor. On that diagram with your pencil draw a line to the hyoid bone. I see -- it looks like this is some sort of medical book or something where you fill in the spaces or whatever. Can you just draw a line from the word "hyoid bone" down to the hyoid bone so we know which is which. There you go.

CC (MR. ZIMMERMANN): Would you believe it's a coloring book, and you color it in?

But this is the hyoid bone, and this is the thyroid cartilage. Correct?

WIT: Yes, that's correct.

Q. And what I'm suggesting is that what happened on autopsy is that you -- when you made your cut that what that reflects -- because this is looking at it from the front. Right? Anteriorly?

A. Yes.

Q. Isn't that the doctor language?

A. Yes.

Q. Why don't you-all just say "front"?

A. We try to in court.

Q. Okay. We've cut it across here. And the hyoid bone is not in this photograph because when you're looking at it from the rear, or -- what do you call that, posterior? What do you call it from there?

A. The back.

Q. The back. That's why you don't see the hyoid bone in your photos?

A. Yes. And what most likely happened is, essentially, when I dissect, I dissect above the hyoid bone. We bring it out intact. So what most likely happened is that my assistant would have, after the fact, dissected it out. And essentially when they took the photos did not include that with that.

Q. By the time the photographer took the photos, you were probably doing something else. Correct?

A. That's correct.

Q. And your assistant had probably just cut the hyoid bone completely away from the thyroid cartilage?

A. That's what I would assume because I know we removed the hyoid bone.

Q. Okay. But that hyoid bone in order to be broken has to receive a direct application of severe force in order to break. Right?

A. That is correct.

Q. If your neck had force somewhere other than on the hyoid bone, that's not going to break your hyoid bone. Am I right?

A. Not unless, like I said earlier, if you have high impact motor vehicle, severe hyperextension of the neck, that is an instance where it can occur and it's not direct.

Q. Okay. We didn't have anything like that in this case?
A. No. Unless in whatever process of what was going on there was such a severe hyperextension of the neck that could have caused it. But it would have to be a pretty severe hyperextension.

Q. Okay. If you learned -- hypothetically, if you learned that there was no direct pressure on the hyoid bone in the dragging incident that was described to you by NCIS, that would lead to your conclusion that that event did not cause the broken hyoid bone that you saw. Correct?
A. That is correct.

Q. And if you learned that some other force, strong steadily direct force, to the hyoid bone on the right side of the neck for a period three, four, five seconds, you might change your opinion that the dragging incident that was described to you led to the breaking of the hyoid bone. Correct?

IO: I'm sorry. Can you rephrase that because I --

CC (MR. ZIMMERMANN): That was a terrible question. Let me start over.

You really don't know what broke the hyoid bone in this case?

WIT: No. What I'm saying is a dragging incident that had been described to me is consistent with the type of scenario that would break the hyoid bone.

Q. Only if there was direct pressure put on the hyoid bone?
A. And that would have to be strong direct pressure such as, you know, if you're actually like this [indicating] or you're dragging away and so it's a strong pressure, but --

Q. Directly on it.
A. But it would have to be a direct strong pressure on the neck.

IO: Let me interrupt. You said something just a minute ago that -- severe hyperextension of the neck could also break it?

WIT: Yes. As I've seen that described, it's been related to high impact motor vehicle accidents. It's a high

impact, in that, it would cause the neck to hyperextend backwards.

IO: But if someone was dragging a body, a limp body, by the chin and the head without putting the pressure on the --

WIT: If that was the case it would have to be a pretty strong force. And to be honest, I've not seen that type of incident described in the literature.

Q. And so if the evidence were, hypothetically, that a person was grabbing another person with a hand behind the head and the other hand on the chin, not touching the neck, and gently, carefully slid this person backwards for 10, 20 feet without ever touching here, you could rule out that as the cause to the broken hyoid bone.

A. If you're talking gently and there was no direct pressure on the neck --

Q. And no twisting the neck and no jerking?

A. Then that would be correct.

Q. Especially if the person stopped periodically and rested and went backward like that [indicating]?

A. Let's just say that would not be consistent with a broken hyoid bone.

Q. But if someone were laying on the ground, prone -- excuse me -- laying on his back on the ground --

A. On the back, yes.

Q. What is that, supine?

A. Supine.

Q. Laying on his back. And he reaches down -- somebody else reaches down -- reaches down and grabs with the left hand and squeezes as hard as he can right in the neck -- and I'm putting my forefingers right up under my chin and my thumb right on the side of my Adam's apple -- that would impact -- one of those fingers or more would impact the hyoid bone; wouldn't it?

A. If you're talking squeezing as hard as you can --

Q. And if that person --

A. Yes, that would be consistent with breaking.

- Q. That could break it?
A. That could break it.
- Q. Now, if something happened like I just demonstrated, you would not expect that to cause petichiae in the eyes; would you?
A. What you did -- I'm sorry -- what you just demonstrated?
- Q. When a person leans down and grabs on a person and grabs another person's neck while that second person is on the ground and squeezed it hard enough to break the hyoid bone on the right side, you wouldn't expect to see -- and that person eventually dies for from that, you wouldn't expect to see petichiae in that?
A. It depends on the mechanism. If it's due to the prolonged compression of the blood vessels leading to asphyxia, yes, in about 85 percent -- 60 to 80, it depends what you read -- you'd expect to see petichiae. You don't always see petichiae, but, yes. But if the mechanism was such as laryngeal swelling with constriction of the airway, then you do not have that increased vascular pressure, and so I would not be surprised with that kind of mechanism if I'm not seeing petichiae.
- Q. Okay.
A. And so, once again, when we're talking about the mechanism of this, it is all very scenario dependent.
- Q. Let me ask you this: Earlier you had talked about broken ribs in answer to counsel's, government counsel's, questions. Let's talk about that. Would you expect a person with the broken ribs that you found, that is, three on one side and four on the other, and the location that they were, to have a great difficulty breathing?
A. I would think it would be difficult. I wouldn't use the term "great difficult." Certainly it wouldn't be difficult; it would be very painful.
- Q. Very painful. And as time went on without treatment, it would grow more painful. Do you agree?
A. That's correct.

Q. And could lead to one gasping for air. It would be consistent with one gasping for air?

A. In my discussions with clinicians with those kinds of rib fractures, you wouldn't necessarily be symptomatic in terms of respiration; but, yes, it would be painful.

Q. Well, it depends on whether the ribs were broken through or not. And you said that some of these were broken through.

A. Some of them were.

Q. All right. So you would expect that if will (b)(6) had those ribs broken as they were, he should have had some difficulty breathing. Right?

A. It depends how you are going to define difficulty. Yes, his respirations would not be optimal. In terms of difficulty, breathing where you're going to, you know, be gasping for breath, not necessarily.

Q. But it could be? Be consistent with it?

A. It could be possible, yes.

Q. All right. And that person would have difficulty getting up off the ground and standing up on this own; wouldn't he?

A. It would hurt.

Q. Because of the pain?

A. It would hurt.

Q. And that would also be consistent with refusing to eat or loss of appetite. Correct? Just because of the pain?

A. That could be something that would keep you from eating or drinking.

Q. He might not have an appetite. I'm sorry. I didn't mean to talk over you.

A. You're correct.

Q. And not only would you not have an appetite, it would hurt to swallow and eat and drink even maybe, huh?

A. We're just talking about the broken ribs?

Q. Broken ribs, severely broken ribs -- seven broken ribs, some of them broken all the way through?

A. It shouldn't effect the -- hurting to swallow and eat and drinks.

Q. Okay. And it would be consistent with a person not wanting to move, just to sit there or lie there?

A. That could be a reason for not wanting to move, yes.

Q. And if you had difficulty breathing over a period, say, from 42 to 48 hours and it got progressively worse, wouldn't you eventually have less and less oxygen that was being processed through the respiratory system as you breathe more shallow, more and more shallowly?

A. It depends what process you're talking about. You're talking about great difficulty breathing.

Q. Uh-huh.

A. You know, something more severe would usually cause great difficulty breathing. If you're just talking about the broken ribs, then no. You know, it's not necessarily over time you're going to have that compromise of air. And, basically, I say this because this was a consideration when I was putting the case together. What is contribution? Could these ribs have caused death of and by themselves, and so I consulted clinicians about this situation to see just how much impact it would have on that. And it would basically be a contribution due to inefficient respiration, but not difficulty breathing, not getting, you know, so little air that you would die from it.

Q. All right. This may be unfair because I know that if you're like most pathologists, most of the patients you work on can't talk to you. So if it's better to ask an ER physician, I will. So just tell me.

But would you agree that if you had seven ribs that are broken like the ones that you saw and there was no treatment and it went on for 42 hours or more, could that lead to death? And if you don't feel like you're the one to answer that, just tell me?

A. This is -- as I said, I did consult clinicians on this. And it was their opinion that, no, this of and by themselves would not lead to death.

Q. All right. That's fair. Let's talk about if you combine it with the fact that during that same time period -- we're going to start with the base -- seven broken ribs broken the way you saw.

A. Uh-huh.

Q. And then someone doesn't eat for that period of time, and someone only has a little bit of water during that period of time, and that person had three incidents, or bouts, of diarrhea after a 24-hour period or so, and the person had upper respiratory problems, asthma, the government counsel called it, and he had allergies to dust and to dirt, and he was under stress, and for his part of the world, he was an old man -- young man for our part of the world -- but an old man at 52 over there, do you think your opinion would change about that possibility leading to death with all those things combined?

A. My opinion as to the cause of death would not change. Certainly these types of things can be contributing factors. The types of dehydration as is described, I don't think of and by itself would be a cause of death. I don't think the dehydration -- I'm sorry -- the broken ribs or those two together would be a cause of death. They could be contributing factors, not a cause of death.

And then when you talk about the asthma, and, you know, I'm not sure what we're talking -- I've seen no documentation of asthma. Most people with a history of asthma and a good deal of the population, our population, as a, quote, history of asthma, which is the type of thing you might see with children or with adults that are using bronchodilators, those are not the types of things that will cause death. And unless there's documentation that someone has been hospitalized on numerous occasions requiring certain medications, where that can be lethal asthma, basically, this is all speculation. They can be contributing factors and they could have made this worse, but the proximate cause of death is the initiating thing that would be a sight in this. And that would be the strangulation. So I still maintain strangulation as the cause of death.

CC (MR. ZIMMERMANN): Next in order would be --

IO: Forty, IO Exhibit 40.

CC (MR. ZIMMERMANN): I've shown it to the government, Mr. Investigating Officer. It's another document provided by the government, NCIS investigation.

TC: No objection, sir.

- Q. All right. I've handed -- because of the time of the day -- if you want to read it, I'll let you read it. But I've handed the investigating officer an NCIS report that said they tracked down (b)(6) brother in Iraq. And I'm summarizing, so if you want to read the whole thing, you tell me. And he says that his brother had a history of allergies to dust and to dirt. He's received medical treatment for it. And he also had upper respiratory problems, especially between April and September. And this was in June.
- A. Okay.
- Q. Now that you know that, do you think that might -- well, I'll put it this way: If you had a patient that was alive and he came to you and he was having all these problems, don't you think you'd put him in a hospital and have him treated for those broken ribs, or maybe intubated and so forth so he wouldn't die?
- A. Once again, you're getting into a clinical area that's -- it's been a long time since I've -- however, basically, what you're describing could lead to a reactive airway disease, but that generally is not the type of thing that is fatal.
- Q. It could lead to pneumonia though; couldn't it?
- A. Yes.
- Q. And pneumonia could lead to death?
- A. Yes, if you have pneumonia. And in this case, there was no evidence of pneumonia.
- Q. Okay. What does it mean to shut down the autonomic nervous system?
- A. In what respect? Like something with what, the corroded sinus maneuver that --
- Q. Let's say as a result of the combination of all these things that I described, the seven broken ribs, the lack of food, the lack of sleep, which we didn't talk about, the three instances of diarrhea, the asthma, the allergies to dust and to dirt, the stress of being a captive in your own land, having pneumonia, could these cause your body, basically, to just shut down, quit working?
- A. In my clinical experience, I would say not.
- Q. What's your clinical experience?
- A. I was a medical doctor, did a full clinical internship.

Q. For how long?

A. Clinical internships are the four years of medical school and a year for clinical internship.

Q. How long ago?

A. This was a little over ten years ago.

Q. Okay. Why don't I ask a currently practicing doctor. That wasn't fair to ask you, so I'll withdraw the question.

What's a flailed chest?

A. A flailed chest is ribs that are broken on both sides, but generally significantly enough -- and great enough number of them would -- because where respiration will be severely compromised, and that is a potentially fatal event. But that's generally when the rib cage is essentially totally --

Q. Disrupted.

A. -- disrupted, the entire rib cage.

Q. Okay. Just a few more, and we'll be finished; I promise. You said that you had testified as an expert over 20 times at Article 32 or courts-martial, quote, unquote, majority, military. Where else have you testified at outside of a military courtroom?

A. When I was doing my forensic fellowship in Baltimore, I testified, I think, about three or four times in the civilian court, and then I've also testified a couple times in federal court.

Q. Okay. Let me make sure I've got this right. Are you saying that if -- you didn't see any swelling in the airway?

A. What I saw, I cannot be sure was what would have been antemortem swelling. The decomposition gives this kind of appearance that may be decomposition, it may be some swelling; but not to see it, doesn't mean it wasn't there in postmortem.

Q. Let me put it this way, based on what you saw and what you think, you wouldn't want to have somebody rely on that to put a young man in a penitentiary; would you?

A. What?

Q. That there really was swelling?

A. Being able to see the edema?

Q. That there really was enough swelling to --

TC: Sir, objection. Goes to ultimate issue.

IO: Sustained.

CC (MR. ZIMMERMANN): I don't think that objection applies at an Article 32. We don't have the rules of evidence here. Everybody has been allowed to give opinions. I'm asking her how strong her opinion is.

IO: Well, then ask her how strong her opinion is.

Q. Is your opinion strong enough that that swelling closed off that airway? Are you strong enough on that that you would want to risk some young man going to a penitentiary based on that conclusion? Yes or no?

TC: Again, sir, objection. Same reason.

IO: It's phrased a little more palatable to me this time.

Q. He said you can answer that.

A. That is not my opinion that that is the cause of death. My opinion is that that strangulation is the cause of death. Essentially, that is what I'm attesting to. That's my job. I don't like putting people away. I don't like the end result of this. My job is to just state the findings and my opinions with reasonable medical certainty. And my opinion is that strangulation was the cause of death. I cannot tell you with reasonable medical certainty what the mechanism that caused the death.

IO: I understand that.

Q. So you're not saying that the hemorrhaging that you found on the -- secondary to the broken hyoid bone caused swelling that shut off the airway? You're not saying that?

A. I'm saying given a certain scenario and based on the findings, that would be consistent with, but that is not, you know, my opinion as to the cause of death.

Q. Okay. Good. I'm glad I asked you because that's not what I thought you said, and I'm glad you said what you just said. Thank you.

I may have misunderstood you again, so I want to clarify this.

A. Please.

Q. Is it your testimony that if there were swelling, in a hypothetical case, not this case, but if there is swelling sufficient to shut off the airway and kill somebody because of asphyxiation, like oxygenation of the brain, that upon death that swelling will not stay in place and, in fact, will shrink back to normal?

A. It's often known to not be demonstrated or appreciated after death. Whether or not it shrinks right back to normal, you know, I can't say. But it's not always obvious to the gross examination at autopsy.

Q. Okay. Where is your handwritten report, ma'am?

A. You mean a final report?

Q. No. You testified that you had a handwritten report?

A. I had a handwritten preliminary report.

Q. Does it still exist?

A. Yes. I gave it to the NCIS agent, and I would have that in my files back in my office.

Q. Why did you give a handwritten report to the NCIS agent? Did they ask you for your handwritten report?

A. That's our standard procedure. When I leave on a case -- I do several cases away from my facility, and actually at our facility, we give them the preliminary report.

Q. So they got it? So if we want it, we have to ask them for it?

A. Yes. Or you could ask me in a week or two.

CC (MR. ZIMMERMANN): May I have just a moment with counsel?

The counsel conferred.

CC (MR. ZIMMERMANN): Thank you very much, doctor. You've been very helpful. No further questions.

IO: How long are you going to be, Mr. Higgins?

CC (MR. HIGGINS): I wouldn't say really long. In the essence of what's happened, I should be short. I have two areas that haven't been talked about. I expect the first one

to be max three questions depending upon answers and the second one to go about ten minutes.

IO: Okay.

And, Lieutenant Folk?

DC (1STLT FOLK): I'll be brief, sir.

IO: Before you get started, I just want to make sure I understand now.

EXAMINATION BY THE INVESTIGATING OFFICER

Questions by the investigating officer:

Q. You're -- in your opinion for reasonable degree of medical certainty, strangulation was the cause of death?
A. That's correct.

Q. The strangulation was caused by the broken hyoid bone?
A. No. Strangulation was the act of constriction around the neck --

Q. -- that broke the hyoid bone.
A. -- that broke the hyoid bone. But the hyoid bone is a sign of strangulation.

Q. All right. And as a result of the broken hyoid bone, there was this swelling that was caused?
A. That is one of the ways that it can happen.

Q. Which constricted the airway?
A. Which would constricted the airway and keep oxygen from getting to the --

Q. To the brain?
A. Yeah, or, you know, through the lungs. That is one of the ways.

Q. So we're --
A. And the other ways are -- and the more common ways are getting -- restricting the blood flow to and from the brain so oxygen doesn't get to the brain or circulate the brain, and that essentially leads to brain death. Or you can get compression on airway just from pressing against it, and that also restricts the oxygen

ultimately getting to the brain. So essentially all of these mechanisms are what lead to asphyxia, which is the ultimate death.

Q. Hypothetically, if there was no broken hyoid bone on (b)(6) would you come to the same conclusion that strangulation was the cause of death?

A. No. If he did not have a broken hyoid bone, I would not be saying that strangulation was the cause of death based on, you know, lack of any other findings.

Q. Okay. And there were no other findings. There's no toxicology to indicate that he had ingested something that would have poisoned him or caused death in that fashion?

A. No.

Q. The broken ribs, in your opinion -- or fractured ribs were not enough in and of themselves to cause his death?

A. That's correct.

Q. And the other factors that were mentioned by Mr. Zimmermann, when you add them all up, the stress, the allergies, the age, the dehydration, et cetera, that wouldn't have been enough --

A. That's in the realm of speculation, and I don't see that being enough to cause death.

Q. Okay. So it was the broken hyoid bone that led you to believe that there was some form of strangulation that occurred here?

A. That is correct. And some -- one of the different mechanisms leading to death with contributions maybe from the ribs.

IO: Okay.

CC (MR. ZIMMERMANN): Can I follow up real quickly to that because it's very important to our case?

IO: Go ahead.

I'm sorry Mr. Higgins, I didn't mean to step on --

CC (MR. ZIMMERMANN): I've asked him.

RECROSS-EXAMINATION

Questions by the civilian counsel (Mr. Zimmermann):

Q. But those are questions that are important, and I want to make sure it's clear that your testimony is that you said without any equivocation that the only way that that -- in this kind of case -- this not an automobile wreck -- but in this kind of case, the only way that hyoid bone would have been broken is if somebody applied direct, strong force directly to it and that dragging somebody with a hand under the chin and behind the head would not break that hyoid bone. Is that right?

A. Unless the dragging created enough impact that there was enough hyperextension equivalent to what you'd see in a motor vehicle accident.

Q. Equivalent to a motor vehicle accident?

A. But, you know, it would have to be a great impact.

Q. And by the same token it would be more likely that if someone with great force and with great strength, grabbed a person directly on -- lying down on the ground on his back -- grabbed somebody with his fingers directly on the hyoid bone and squeezed as hard as he could. That's more likely to have caused a broken hyoid bone than dragging someone?

A. If that's a great force, yes.

CC (MR. ZIMMERMANN): Thank you.

IO: Mr. Higgins, here's what we're going to do. We're going to just take a five-minute recess, a comfort break, whatever you want to call it, and then allow the court reporter the relax her fingers. If anybody needs to take a break, we'll do that and then we'll resume with you. How's that?

CC (MR. HIGGINS): Yes, sir.

IO: We stand in recess for five minutes until 1700.

The Article 32 investigation recessed at 1654, 27 January 2004.

The Article 32 investigation was called to order at 1700,
27 January 2004.

IO: This Article 32 will come to order. All parties who were
present when the court recessed are once again present.
Accused and counsel are present.

Mr. Higgins.

CC (MR. HIGGINS): Thank you, sir.

CROSS-EXAMINATION

Questions by the civilian counsel (Mr. Higgins):

Q. Good early evening.

A. Thank you.

Q. My name is Keith Higgins. I'm an attorney for Major
Paulus.

10 June 2003 was the day you did the autopsy of
(b)(6) We've already established that. We heard
that date ad nauseam. During that examination, did you
take a sample of (b)(6) eye fluid?

A. We tried, but it was so dry there was just none that we
could obtain.

Q. Have you taken eye fluid samples in other autopsies?

A. That's the common practice in all our cases.

Q. And what are some of the things that you look for in the
eye fluid?

A. Essentially -- some people -- you mean in terms of
testing? Normally, we will use this toxicology testing
or depending on the case when we are looking at -- you
know, for natural diseases, there's certain other
studies you can do, like electrolytes, certain drugs, or
substances in the blood that you can test for.

Q. Examination of the eye fluid of a deceased individual --
I think we can probably assume we're talking about a
deceased individual for the rest of my questioning --
would the examination of the eye fluid tell you whether
somebody had had a seizure?

A. Not to my knowledge.

Q. So in your experience, you don't believe that to be true?

A. Not to my knowledge. There are some things about testing postmortem fluid and blood and specimens, but they are very controversial in terms of their value. Sometimes there's some substances that you see after seizures that you can test for, but some people don't rely on them. And, basically, in our office we don't, in the Office of the Armed Forces Medical Examiner.

Q. In fact, it's very difficult if somebody died from a seizure postmortem -- well, obviously they are dead, so it would have to be postmortem. It's very difficult in doing an autopsy to determine that someone has died from a seizure.

A. Yes. Unless you're able to establish a clear-cut anatomic focus on the brain which most often you're not able to.

Q. You weren't able to tell that in this case?

A. No.

IO: Mr. Higgins, what kind of seizure are we talking about? Is there more than one type of a seizure? Are we talking about a heart attack?

CC (MR. HIGGINS): No. A seizure would be -- as I understand it, Doctor, it's a problem with the electrical current in the brain?

WIT: You can have seizures for a lot of reasons due to an abnormality in the brain. You can have seizures due to different metabolic processes like if you had severe diabetes, basically were sick with that. You can have seizures, original seizures, after having a heart attack. Some people will just have them. And then there are seizures that you have for no reason. And I mean no known reason. People have them just idiopathically.

IO: Thank you.

CC (MR. HIGGINS): Yes, sir.

In your CV, you list -- there's a series of articles which you've published?

WIT: That's correct.

Questions by the civilian counsel (Mr. Higgins):

Q. Do you have copies of all of those?

A. I would assume so. I at least have copies of what was submitted for the publication.

Q. If requested, would you be able to submit those to government counsel to pass on to us?

A. A lot of those were written quite a while ago. So, basically, I think you'd have to look them up in the journals.

Q. But you do have some in your possession?

A. Not after as moves as I've had. I may not have.

IO: Colonel, could you speak up when you're answering the questions, please, so everybody in the courtroom can hear you, particularly myself and the court reporter.

WIT: Okay. Sorry.

Q. You've used the word "scenario" quite a few times in your testimony today.

A. Yes.

Q. And there's been different scenarios and hypotheticals that have been given to you in your questions by both the government counsel and Mr. Zimmermann. Correct?

A. Yes, that's correct.

Q. Okay. And when you testified about the airway -- the hyoid bone broken and the airway swelling and closing and that leading to the cause of death, that was based on a scenario that the government gave you recently, I believe, was the term that you used?

A. Well, first I don't think I termed it that way because the mechanism doesn't lead to the cause of death. The cause of death initiates the mechanism. So I can't imagine that would be the terminology that I'd use.

Q. Okay. I tried to do it quickly.

At some point you've met with the government prosecutors?

A. That is correct.

Q. And you met with them recently?

A. That is correct.

Q. In fact, you flew in this weekend?
A. That is correct.

Q. And you sat down with them?
A. For short periods, yes.

Q. They showed you some pictures that you'd never seen before?
A. That is correct.

Q. And they also asked you a hypothetical question?
A. That is correct.

Q. If someone had been dragged by the neck, could that have caused -- if (b)(6) had been dragged by the neck for a number of feet, could that have caused what the -- the death as you saw it in your autopsy? They asked you that question?
A. That is correct. At some point in time.

Q. And you got up on the stand today and testified about that?
A. I believe I did.

Q. Okay.
A. It's real late in Germany.

Q. It's also very late in Massachusetts. So we'll work together.
But that's scenario dependent. As a pathologist, you rely on additional information besides what you do in the autopsy?
A. That is correct.

Q. Police reports are important?
A. That's correct.

Q. Witness statement are important?
A. That's correct.

Q. You need those because you need to know what else was going on besides what you see there?
A. That's correct.

Q. You have the end result on your table, a dead body?
A. That is correct.

Q. Now, I want to clear up something that's probably my fault because I'm not quick enough to follow it.

Colonel Gallo, during your questioning -- two times Colonel Gallo has asked you questions today. And one time he said is it -- you talked about that hyperextension of being the way a hyoid bone breaks. Okay? Do you remember he asked you that line of questioning?

A. Being the -- being a way that it could break, and it's not a common.

Q. Right. And he asked in the dragging scenario -- he gave you hypothetical in the dragging scenario, could it be possible that it was hyperextended and broken. And the first time you talked about that, you said it was unlikely.

A. Okay.

Q. Did you say that?

A. I may have. I think I said it's not been described in this type of situation. Whether it can, I would think it would not be likely unless there is some great impact involved. And I hope that's what I said.

Q. You talked about on June 10 prior to -- prior to -- we had a whole line of questioning with Captain Ashe -- and you talked about you needed to do quality assurance prior to coming to your conclusion?

A. In a sense of type. Generally, I run all of my homicides, which is a type of quality assurance, through the Office of the Armed Forces Medical Examiner. Whether it's an official consultation, whether it's a discussion of the case, whether it's a sharing of the photos, we'll come into a group opinion. In this case, I had another forensic pathologist, so I ran this by the Armed Forces Medical Examiner. And in a sense, it's a type of quality assurance.

Q. And you called Washington, D.C.?

A. After I left Captain Ashe and the others.

Q. Yes. You called him in Washington, D.C.?

A. I called the Armed Forces Medical Examiner in Washington, D.C.

Q. Was it male or female?

A. Male.

Q. You spoke to him?

A. Yes.

Q. This was 10 June?

A. I believe so.

Q. Same day as the autopsy?

A. I believe so.

Q. Did you send him any documentation?

A. Eventually, yes. Not at that time.

Q. So this quality assurance consisted of a conversation with him in which you reported what you saw?

A. It's a form of quality assurance. It's not the formal quality assurance when you send the whole case to them and you get a response. But this is a form of quality assurance, yes.

Q. This is what I saw?

A. This is what I saw; this is the deal; what do you think. That type of thing.

Q. And did you need his permission to reach your conclusions?

A. No. Although, essentially, it's important to me that he concurs. If we totally disagree, he cannot get me to change my opinion. I would not do that. But it's just a process of strengthening opinions.

Q. And, again, his only source of information is you during that conversation?

A. At that period of time, yes.

CC (MR. HIGGINS): I have no further questions, sir.

IO: Lieutenant Folk?

DC (1STLT FOLK): Thank you, sir.

CROSS-EXAMINATION

Questions by the defense counsel (1stLt Folk):

Q. Mr. Zimmermann had asked you towards the end of his examination about something called flailed chest.

Do you remember that?

A. Yes, I do.

Q. Okay. And that's a situation where broken ribs will lead to severe difficulties in breathing?

A. To my knowledge, it's a situation of extensive broken ribs where the actual rib cage is separated from the back of it so it gives an instability to the chest.

Q. And that wasn't the situation with (b)(6) Correct?

A. I would not call this a flailed chest.

Q. Now, you also talked about possible effects that broken ribs such as what you have here, various ribs broken on each side of the chest, what effects that might have on appetite, eating and drinking comfort levels and things like that. Do you remember that?

A. Vaguely, yes.

Q. Again, hypothetically speaking, would a broken hyoid bone also effect whether or not drinking water was comfortable or uncomfortable for you?

A. You mean for the victim.

Q. Yes. Well, for anyone -- yeah.

A. That could very easily -- there are several types of symptoms that you have after strangulation, one of which is sometimes difficulty speaking, severe pain, difficulty swallowing and that would include intake of eating and drinking.

Q. And so if at hour one I reached down and grabbed somebody with enough force to break their hyoid bone and they didn't die from the strangulation, but continued on with this broken hyoid bone, they might not want to eat or drink because it would hurt in that general area?

A. That's a possibility, yes.

Q. Now, drawing your attention to these external abnormalities that you noted in your report and you saw when you performed your autopsy, there was some bruising to the legs. Right?

A. That's correct.

Q. On the body. And then there was also bruising in the lower back of (b)(6)

A. That's correct.

Q. And I think also in one of the IO exhibits, I think it was number 9, I believe it was photo 16 where we saw some pictures of the bruising on the abdomen as well of (b)(6) Right?

A. That's correct.

Q. And your testimony is that the bruising on the legs and on the back was more severe than the bruising on the abdomen. Correct?

A. That's correct.

Q. And by more severe we're talking about deeper bruising, more hemorrhaging of blood in the various layers of skin?

A. That's correct.

Q. And I think your testimony was that the back was the actual -- where you saw the worst bruising followed by the legs?

A. Actually it was the backs of the legs. I believe on the left side was the worst.

Q. Either way, the back of the legs and the back were worse than what you saw in the abdomen?

A. That's correct.

Q. You also talked a little bit earlier, I guess, about the scene that was going on when you arrived to perform the autopsy. And you said there were some investigative agents there, some members of the staff judge advocate; and you specifically talked about some of the opinions held by the investigative agents or the NCIS agents. Do you remember that?

A. Vaguely, yes.

Q. Okay. And you said that the NCIS agents on the scene were expecting, essentially, that the cause of death would be found to be of natural causes. Right?

A. The investigation agents on the scene at the Whitehorse facility apparently relayed this to the investigating agent that was at the place of autopsy. And the impression I was given was this would be likely natural cause of death.

Q. And that opinion was based on the appearance of
(b)(6) dead body and the lack of any significant
marks that they saw. Right?

A. From what I remember, she was told that there were no
injuries to the body.

Q. Now, you mentioned --

A. And I'm sorry. This is what she told me. What really
went on, I don't know.

Q. But that's what was made apparent to you.

You talked about the amount of force that it would take
to break a hyoid bone and that somebody could do it with
their hand, they could exert enough force with their
hand. Is that right?

A. That's correct.

Q. Okay. Could you exert enough force with, say, the crook
of your elbow, if you had somebody like in what you
might call a head lock to break a hyoid bone?

A. You could.

Q. Okay. So it doesn't have to be your hand necessarily?

A. No.

Q. But that's one of the more common ways to break a hyoid
bone?

A. I think you see it more commonly in the hand than with
the choke holds. But you can see it with both.

Q. Do you think a 6-foot 2-inch Marine who weighed about
200 pounds could generate enough force to break a hyoid
bone with one of his hands if he was a healthy male?

A. I would think a Marine could probably -- any Marine
could probably do that.

Q. And my last question for you. You said you testified
numerous times. Have you ever testified as a defense
expert witness?

A. I have consulted. I've been a consultant for the
defense on several occasions. However, because of the
Armed Forces Medical Examiner system rules or
regulations, we're not allowed to be exclusive witnesses
to either side. And so when it comes to my consulting
with the defense then -- when they hear I can't be an
exclusive witness, they generally say, Well, thank you
very much, but no thanks.

DC (1STLT FOLK): Thank you, sir. I don't have any more questions.

IO: Captain Francis, do you think you're going to be a while?

TC: I have three hypotheticals.

REDIRECT EXAMINATION

Questions by the government:

Q. Ma'am, I want to present you a couple of different hypotheticals, and tell me what you think in your expert opinion is most likely.

A. And this is hypothetical one --
I'm sorry. Just so I don't get confused, are you saying hypotheticals given we have the victim's findings as in this case or --

Q. Correct, ma'am.

A. Just hypotheticals out of the blue?

IO: Let me stop you here for a second. I anticipate that your hypotheticals are going to generate more cross-examination.

We'll, we'll stand in recess for the evening then.
We'll stand in recess now until 08 tomorrow morning.

The Article 32 investigation recessed at 1721, 27 January 2004.

The Article 32 investigation was called to order at 0800,
28 January 2004.

IO: This article 32 session is called to order. The time is 0800, 28 January. All parties who were present when the court recessed are once again present. Staff Sergeant Wyss, the court reporter, is also present.

Are there any matters we need to take up before we resume with redirect examination of Lieutenant Colonel (b)(6)

CC (MR. ZIMMERMANN): Just to keep the investigating officer informed, the counsel have conferred this morning. The first witness will be a continuation of the previous witness, the doctor. We may ask for a brief recess at the conclusion of her testimony so counsel can confer as to whether we will call our consultant. There's been an agreement to take him out of order. If we're not going to call him, we'll tell him, and we'll proceed to the next witness. And if we are going to call him, there's an agreement that we call him right then so that he can leave.

IO: Okay. Understood.
Mr. Rehkopf?

MR. REHKOPF: Your Honor, to follow up on. In case they don't call, I've instructed my client to be here at 0830.

IO: And he'll be the next witness?

MR. REHKOPF: Yes, sir.

IO: All right. With that, we'll get started.

Lieutenant Colonel (b)(6), would you like to take the witness stand. And I'll remind you that you're still under oath.

The witness did as directed.

IO: Captain Francis.

TC: Yes, sir. Thank you.

REDIRECT EXAMINATION

Questions by the government:

Q. Now, ma'am, based on your observations of the hyoid bone on (b)(6) and the break that you saw, in your opinion, do you believe that an average person with that type of break would feel pain from that?

A. I would expect so. It's a painful area.

Q. Would they in your opinion have difficulty talking?

A. That's one of the symptoms that you'd see with those types of injuries to the neck.

Q. What other types of symptoms?

A. As I said earlier, pain, difficulty talking, possibly difficulty swallowing. There may be some difficulty breathing.

Q. Okay. Now, ma'am, I want to present to you a couple different hypotheticals and get your opinion as to what you feel, based on these hypotheticals, would be the most -- from your observations on (b)(6) and the nature of the injury to the hyoid bone, what is this most, in your opinion, the most probable result of the cause of that break based on these two hypotheticals. All right, ma'am?

A. Okay.

Q. The first hypothetical, 35 hours prior to the time of death -- approximately 35 hours prior to the time of death, a Marine walks up to (b)(6) who's lying on the ground, puts his hand down on his throat area in order to get his attention, and when he's gripping -- let's even use Mr. Zimmermann's example -- and he's gripping it tightly, and then 35 hours then passes until the time of death. So that's the first hypothetical.

The second hypothetical, approximately 7 hours prior to the time of death, an individual grabs (b)(6), one hand on the back of the head, the other hand up under the chin and on the jaw region and on the throat region and has him in that manner, and has him propped up -- his upper neck and back up on one of his legs --

IO: Captain Francis, I don't mean to interrupt you. Could you start that hypothetical over again. I want to make sure I've got it right.

Q. Again, hypothetical number two. A Marine grabs (b)(6) puts one hand behind (b)(6) head, takes the second hand, places it up under his jaw into his neck region. He's got him like that, and then he props him up on his leg; his upper back, neck, up on his leg, and for 30 feet drags him, his body in that fashion; and there's no support from (b)(6) in any way with his hands supporting his neck or his hands or the Marine's hands in any way. And from that point, seven hours later (b)(6) dies.

In your opinion, what do you think is the most probable cause with those two examples of the break of the hyoid bone?

A. I would say the degree of force to break this hyoid bone is probably the greatest factor on this. So depending on the degree of force, particularly since the hyoid bone was still pliable to palpation, not firm and very calcified, more easily broken, depending scenario number one, the degree of force that's used, I would say the second scenario is most likely the amount of force you would expect.

Now, the first scenario is really dependent on the degree of force. That doesn't sound like that would normally be a very forceful enough situation to fracture the hyoid bone. And then the issue of the timing. Presumably with a victim who is conscious for a period of time after this, the more reasonable time period that I've seen, especially that's been described by the clinicians, would be anywhere from a 6- to 8- to 12-hours, sometimes 24-hour time frame. So I would say 35 would sound a little bit long for this to develop without significant difficulties in breathing earlier.

So to answer your question, I would say number two is more -- the more consistent scenario with the findings and the case as I know it to be.

Q. Now, ma'am, does your opinion -- does any of that take into account the hemorrhaging that you saw in the photo that we saw earlier with the hyoid bone and the larynx?

A. Once again, the hemorrhaging appeared relatively fresh to me. The type of thing you'd say -- you know, you'd

see within approximately 24 hours. But this is subject to a great many variables. So I would not be making this opinion based on that with any reasonable medical certainty. I think it looks more fresh than 35 hours, but I can't rule out that -- that time period could have been possible.

Q. Okay. Just so I understand, based on your expert opinion, though, you think it's fresher than 35 hours out?

CC (MR. ZIMMERMANN): Objection. She just said she could not make that conclusion.

TC: She said to a reasonable medical certainty. There's a difference between reasonable medical certainty and just her opinion as an expert.

CC (MR. ZIMMERMANN): Well, I object to her opinion. It's not to a reasonable medical certainty then.

IO: Your objection is noted.

You may ask the question.

WIT: What was --

Q. It went to the freshness of the injury, ma'am. You were talking about the freshness of the injury. Based on your expert opinion, do you feel on the observations that you made on that injury on the neck that it was too fresh to be 35 hours out from the time of death?

A. In my opinion based on probability more likely than not as opposed to -- not speculation, which I would not speculate on something like this. I would say it's more likely than not to be fresher than 24 hours, but I'm not saying this with reasonable medical certainty.

Q. I understand.

A. So I hope that's clear. It's a certain level of certainty, but not speculation.

Q. Okay, ma'am. Now I have one more hypothetical for you. Taking to account the facts surrounding hypothetical number two, with the dragging that I just described, if an individual was dragged in that manner and had broken -- and it had caused a break in the hyoid bone and death then occurred six to seven hours later, is

- there anything that could have been done. theoretically, medically that could have saved (b)(6) life?
- A. With the kind of injury you have with laryngeal swelling that would constrict or obstruct the airway, that can be treated with medical intervention procedures such as intubation or a tracheostomy or other surgical procedure. So it's really dependent on what level -- or type of medical care would be available.
- Q. All right, ma'am. But it is possible depending on the medical care available?
- A. Yes, situations like that, these victims have been saved by intubation, tracheostomy or other surgical procedures.
- TC: Thank you, ma'am.
- That's all the questions I have, sir.
- IO: I have a hypothetical of my own now.

EXAMINATION BY THE INVESTIGATING OFFICER

Questions by the investigating officer:

- Q. It's a modification slightly from Captain Francis' hypothetical two. The way I observed Captain Francis, the placement of his hands, he had one hand supporting the head, behind the head, and he had his other hand -- it looked like to me, his right hand -- it was underneath the chin and at the upper part of the neck.
- Is that the way observed it as well?
- A. That's what I thought I was referring to.
- Q. Okay. That's the way I saw it.
- Let me ask you this: If one hand was supporting the head, behind the head, and the second hand, or the right hand, was more on the chin and not touching the neck at all, more like I have it right now. Do you see what I'm [indicating] --
- A. Yes.
- Q. There seems to me to be a difference to me in the placement of the right hand, as opposed to underneath the chin and touching the upper part of the throat.

It's more on the chin, and maybe to some extent covering the mouth somewhat, without touching the neck at all. Would that cause the hyoid bone to break, the other factors in hypothetical number two being consistent, the dragging 35 feet or so?

- A. I don't think that would be the right kind of force in the right kind of place. If it's strictly on the face and not in the chin area where the hyoid bone is, I don't think that's the type of force that would break the hyoid bone because of the placement. And I don't think -- and that would be speculation -- that that would be enough force to cause the hyperextension of the neck.

IC: All right. Thank you. I don't have any other questions. But before you begin your cross, let me just take some notes.

RECROSS-EXAMINATION

Questions by the civilian counsel (Mr. Zimmermann):

- Q. Doctor, I'm going to be brief with you this morning and confine the questions strictly to what Captain Francis just asked you. Let me close the loop on what the investigating officer was asking you. He was asking you what I'll call scenario, or hypothetical, number four. Okay? Because he had you -- had three different scenarios. Right? Captain Francis asked you three different ones?
- A. I'm looking at two different scenarios, so what you choose to call this, I'll accept.
- Q. Let me restate that then. I would like you to make a comparison like he asked you to make a comparison. I want you to compare the hypothetical where Captain Francis said you had a man lying on his back, another Marine reaches over, applies pressure directly to the throat area. That's hypothetical number one. You said depending on the force, that could break the hyoid bone. That's the one that happened 35 hours before. Okay. Are you with me?
- A. That's correct.

Q. That's the first hypothetical.

I'd like you to compare that hypothetical to the one Colonel Gallo gave you where approximately seven hours before death (b)(6) was dragged -- I won't quibble with the feet right now -- but in the exact manner and distance that Captain Francis said to you, but with Colonel Gallo's modification that the hand was on the chin and never touched the neck. Are you with me on the two?

A. Uh-huh.

Q. It's more likely than not comparing those two that the first scenario, or the first hypothetical where the man reaches over and directly touches the throat and applies great pressure would have caused the break you saw than the one that Colonel Gallo showed, where there was never any contact with the neck at all. Am I right?

A. I believe if I understand what you're saying, I think the most important issue is the force and where it's located.

Q. Sure.

A. And so if the force is not on the neck with this third or fourth scenario you're presenting --

Q. Right.

A. It's correct that pressure on the neck, if it's great enough, would be more likely to cause the hyoid bone fracture than pressure on the chin or lower face.

Q. Right. And if I understood where the questioning was going, Captain Francis was trying to distinguish the time frames. And you were candid, and you said you said that you can't say to a reasonable medical certainty about the time, you know, comparing 7 hours and 35 hours based on the hemorrhaging you saw, because all the things we talked about yesterday, the decomposition, et cetera, wouldn't that allow you, as an expert, to say when that hemorrhaging occurred. Am I right on that? Do you have an opinion to maybe more likely than not but not to any reasonable certainty as for timing to the injury? Right?

A. That's correct in that the decomposition and not having microscopic examination available you can intend to pin that -- point them closer, but without that, we're in a much broader range and less certainty.

- Q. Yes, ma'am. Now, you did tell us yesterday that as part of your medical legal investigation assignment that in addition to your external/internal examination on autopsy and the photos, you would also consider investigative reports and find out basically what the other factors bearing on this were. That's part of your normal protocol?
- A. That's correct.
- Q. Now, if you learned -- so you can try and distinguish between this 35-hour incident and the 7-hour incident which one is more likely than not, and not have to just rely on looking at the hemorrhaging in the larynx area. You said this morning that the hyoid bone broken, as the one you saw, would cause pain that would result in difficulty talking, swallowing, or breathing. Right?
- A. These are symptoms that you can see. Whether or not that occurred, I can't say. But these are typical symptoms --
- Q. You would expect to see with a broken hyoid bone?
- A. Yes.
- Q. Now, let me tell you, if you learned that people had sworn under oath that about 32 hours or so before death, (b)(6) was having great difficulty breathing to the extent that he was gasping, needed assistance walking, never ate after that, was having difficulty drinking and, that that situation of the difficulty talking, difficulty swallowing, difficulty breathing, and difficulty eating, all existed for some -- pardon me -- 27 hours before death, would that affect your opinion then as to when the hyoid bone was broken?
- A. I would think particularly with the issue of the gasping -- and gasping is a very subjective term -- that would be more likely what you'd see with the fractured hyoid bone.
- Q. Yes, ma'am.
- A. Yes. Now, whether there would be gasping from the ribs and the pain in the ribs, once again, it's quality of the gasping whether it's related to difficulty breathing. You know, that may have been a factor. I don't think the ribs were significant enough for severe difficulty breathing. But it depends on the quality of the gasping. But certainly --

Q. How about the swallowing?

A. The swallowing, you can see this with the hyoid bone fracture.

Q. And let me just close the loop on that by asking you that -- if after this event, where the dragging occurred so we know which one we're talking about -- the dragging event. If there was no discernible change in the condition of (b)(6) relative to his breathing, swallowing, eating -- no discernible change after that event from the way he was before that event, would that make you feel even more confident that the more probable cause was the event that occurred 35 hours?

IO: Before you answer that, could you ask that question again because I missed the first part of it. I wasn't sure what you were comparing.

CC (MR. ZIMMERMANN): Okay.

IO: Before Lance Corporal (b)(6) took him out into the pen.

CC (MR. ZIMMERMANN): Right.

If after the dragging event, that was described to you by Colonel Gallo with the hand on the chin, not on the neck, if after that event there was no discernible change in the outward symptoms with regard to eating, talking, breathing, so forth -- on other words, if (b)(6) continued to act basically the same way in regard to those things after the dragging event described by Colonel Gallo as he had been doing the previous 27 hours after the first event that occurred 35 hours, wouldn't that make you even more confident that the hyoid bone had been broken in the 35-hour event and not the second one?

WIT: Once again, I place different weight on different types of evidence. The most important thing, as I said, is the force and the location. Now, if you talk about the symptoms, as you just did occurring, you know, what the 30 hours, 30-some hours earlier, reports of symptomology are supportive evidence, but they are not as conclusive. It would raise the support for that scenario if it was, in fact, that the pressure at that time was strong enough to cause the fracture to the hyoid bone.

Questions by the civilian counsel (Mr. Zimmermann):

- Q. Well, let me ask you --
- A. And it would lend support to that. However, once again, the important thing is the type of pressure that was placed to actually break it. That's what I would rely on the most.
- Q. Okay.
- A. Everything else is basically supportive evidence and much less than reasonable medical certainty.
- IO: I'm not sure I understood the answer. And in response to Mr. Zimmermann's questions are you saying then that if the condition was essentially the same, before the dragging as it was after the dragging, meaning as he has described in his question that there was difficulty swallowing, gasping, lack of an appetite, didn't want to drink water, couldn't stand on his own without assistance, those sorts of symptoms, if those were present before the dragging incident and (b)(6) condition remained the same afterwards, even though not conclusive, are you saying that that would be supportive of the fact that the hyoid bone could have been broken before the dragging incident?
- WIT: Yes. Given the scenario that you're telling me that there was a great deal of pressure exerted on the hyoid bone earlier, and, yes, this would add support that this could have been it. But I would need to hear that there was great pressure on that because it's a very difficult bone to break with a pliable bone like this. They are not that easy to break.

Questions by the civilian counsel (Mr. Zimmermann):

- Q. I guess to try to close that circle and ask it a slightly different way, I guess my question wasn't as artfully asked as it should have been.
- If there was no symptom after the dragging event described by Colonel Gallo -- if there was no symptom of difficulty swallowing, breathing, or talking, that was any different after the dragging than it was before the dragging, you can conclude, can we not, that that dragging event did not break the hyoid bone because you didn't see any change?
- A. Well, that depends on what's actually causing the

symptoms. If you're telling me the symptoms originated from a fractured hyoid bone in a situation that was great enough to fracture it, then, yes, then you would assume the symptoms were caused by that earlier event and the fractured hyoid bone. However, if I don't think there's enough pressure, you know, for those symptoms, then I would wonder maybe the symptoms are due to something else.

Q. Okay. Let's leave the first one alone. I think we answered that question.

A. Okay.

Q. Let's just concentrate on the dragging event.

A. Okay.

Q. If it's the way Colonel Gallo described it -- and I want to be fair to you, that's the way the evidence has been. Okay? That's the only evidence we have is that that's exactly the way Colonel Gallo described it, hand behind the back to support the -- on the back of the head to support it and a hand on the chin to cup the chin for a grip so that you could pull backward gently, slowly. That's the only evidence we have. And there's no change difficulty in talking, swallowing, or breathing, which were the symptoms that you gave with a broken hyoid bone --

TC: Sir, at this point, I object because I think he characterized the statement, I guess, because at this point, yes, that is correct. That is the only evidence that's been heard in the cupping of the chin. I grant you that. But there's much more evidence yet to be heard in this case, that that would be qualified I guess.

IO: I appreciate your comment. That's noted.

Go ahead, Mr. Zimmermann.

Q. If there's no change in the symptoms that we all agreed with you would be an indication of a broken hyoid bone, how could one assume that the dragging caused the hyoid break? You can't.

A. If you give me the scenario you just told me where the hand was on the chin --

Q. Uh-huh.

A. Then I agree. I don't think with the hand on the chin that is the sufficient location to fracture the hyoid bone with or without symptoms.

Q. With or without symptoms?

A. Yes. So the symptoms don't really -- they lend support, but the important issue is where is the pressure on the neck and how great is the pressure?

Q. If there's some confusion about the amount of pressure in either one of those scenarios -- if I'm understanding you right, you're saying, Look, what we should be concentrating on is where was the pressure applied and how much was it?

A. That's correct.

Q. That's what you're saying?

A. Yes.

Q. Then we need to examine -- and if a hyoid bone is broken, you would expect to have these difficulties, talking, swallowing, breathing, eating, and so forth, that's an indication that the hyoid bone is broken?

A. It's an indication. It doesn't always happen, but it can happen, yes.

Q. So if the man reaching over and grabbing the person with his fingers on the hyoid bone wasn't done with enough force that you would say, Well, that makes it less likely that that broke the hyoid bone? Right?

A. If you're telling me there's never been any force on the neck, but it's significant, then, yes, I would say that the hyoid bone was broken in some other place and time.

Q. And by the same token, just to be fair to Captain Francis' point he's making, if somebody speculates or says or thinks that during the dragging incident that there may have been -- the bottom part of the palm or something may have touched the neck, you're still saying though that whenever pressure that was on the neck had to be applied directly to the hyoid bone with sufficient force to break it?

A. That's correct.

- Q. Just touching the neck without sufficient force and being directly on the hyoid bone will not break the hyoid bone?
- A. That is correct. You need a substantial force at the right location, and, basically, what I'm saying is that's the most important issue.
- Q. One last question. The mechanism of death from the broken hyoid bone in your opinion would be that in this case hemorrhaging that led to swelling that obstructed the airway that eventually caused death?
- A. Given the scenario that the victim did not die in within a relatively short period of time, that's correct.
- Q. Right. And --
- A. I'm saying that is a more plausible scenario, and the findings would support that, yes.
- Q. And you did not find on autopsy -- you did not find on autopsy any swelling in the airway?
- A. And, no, that's not surprising in a postmortem state in a dry, you know, very arid environment and then especially with the decomposition.
- Q. Is that a no?
- A. That's a no.
- Q. You did not find swelling on autopsy?
- A. Not anything that was appreciable grossly.
- CC (MR. ZIMMERMANN): Thank you.

IO: Mr. Higgins, can you give me one minute while I finish up some notes.

And before you get started, I have one question.

EXAMINATION BY THE INVESTIGATING OFFICER

Questions by the investigating officer:

- Q. And the hemorrhaging was caused by the broken hyoid bone?
- A. That's correct, sir.

Q. So you have a broken hyoid bone that caused the hemorrhaging that leads to the swelling that leads to the obstruction of the airway that ultimately lead to death?

A. That is one mechanism.

Q. One mechanism.

A. Yes.

IO: One mechanism. Okay.

It's all yours, Mr. Higgins.

RECROSS-EXAMINATION

Questions by the civilian counsel (Mr. Higgins):

Q. Good morning.

At any point after you found out about the death of (b)(6) did you ever have any conversations with Lieutenant Colonel Miller?

A. The name doesn't sound familiar. I had several conversations, but certainly a Lieutenant Colonel Miller -- perhaps, if you told me what his position was, I might remember.

Q. He was an SJA, senior SJA, involved with the investigation.

A. There were the two --

Q. Right.

A. -- SJA's.

Q. There was the two captains?

A. Yes, and they were captains, and I do not recall speaking to any other SJA's. We were relatively isolated in terms of the command and the folks involved with this.

Q. Okay. So it was the two captains that were in the autopsy, and you spoke to probably these two captains?

A. These two captains at a much later time. But I don't recall.

Q. Right. Yes, ma'am. Besides those four military attorneys, have you spoken to any other military attorney about this case?

A. Well, the Armed Forces Medical Examiner is an attorney as well as a forensic pathologist, so I have spoken with him.

Q. Any other?

A. There was some e-mail correspondence from a -- it was either a Navy Captain or Colonel Scully, and I believe he's here.

IO: That was via e-mail?

WIT: Via e-mail. And just recently just because of some logistical difficulties getting here, I spoke to him again. But I believe he's here involved in legal services somewhere. And this was several months after the autopsy.

Q. And did those e-mail correspondences deal with the facts of the case or just logistical, like, your travel plans?

A. No. Basically they wanted an autopsy report which I would not release until I got at least the Navy Criminal Investigative report, and so they helped facilitate my getting that because I generally wouldn't release the report unless I have something investigative in writing rather than just verbal conversations.

Q. Do you still have copies of those e-mails?

A. I don't have them here. They probably are on my PC back in my office.

Q. In your office in Germany?

A. Yes.

Q. You'd be able to get those to the prosecutors?

A. I can't guarantee it, but there's a good chance I can.

Q. If you have them?

A. If I have them, I could. Although, e-mail's not been real reliable between us, but I could probably fax it to them if I had to.

CC (MR. HIGGINS): Okay. That was my next question. Okay. Thank you.

IO: Lieutenant Folk?

DC (1STLT FOLK): No, sir.

IO: Is this witness subject to recall and needs to stick around?

TC: Sir, that's going to depend on what the defense does next.

CC (MR. ZIMMERMANN): We don't have any need for her to stay around.

CC (MR. HIGGINS): Can I have one moment to confer with Mr. Zimmermann?

IO: Sure.

CC (MR. HIGGINS): No, sir. No, we don't.

IO: All right.

Lieutenant Colonel (b)(6) your testimony here today has come to its conclusion. However, I'll ask you to remain in the area until Captain Francis or Captain McCall has informed you that you can return back to Landstuhl or wherever your next place of duty is.

WIT: Okay. Remain in this building or in the area?

IO: In the area of Camp Pendleton just in case you're needed to be recalled at this hearing.

WIT: Okay.

IO: I'm going to admonish you, however, in the interim not to discuss your testimony with anyone except the attorneys involved in this particular investigation and that are in this room and attorneys that may represent other Marines who are pending disciplinary charges as a result of this. And I don't know if there are any or not, but if there are, you're at liberty to discuss the testimony with them.

WIT: I'm sorry. Excuse me. I am at liberty?

IO: Sure. I'd also advise you that the media has been covering this case as you may or may not now, and I would be very cautious in answering any of their questions should they approach you.

WIT: Certainly. And if that was the case, I would never do that without a PAO and checking with the lawyers.

IO: So it sounds like you're well versed in how to handle yourself in that regard.

So you're excused for the time being. Thank you very much.

WIT: Okay.

The witness was excused and withdrew from the courtroom.

IO: Mr. Zimmermann, would you like a brief recess?

CC (MR. ZIMMERMANN): Yes, sir.

IO: All right. We stand in recess for five minutes.

The Article 32 investigation recessed at 0834, 28 January 2004.

The Article 32 investigation was called to order at 0938, 28 January 2004.

IO: This Article 32 will come to order. All parties who were present when the court recessed are once again present. Accused and counsel are present.

Mr. Zimmermann, as I understand it the defense intends to call out of order with the consent of the government, Doctor (b)(6).

CC (MR. ZIMMERMANN): That's correct, Mr. Investigating Officer.

IO: Please proceed.

CC (MR. ZIMMERMANN): We call Doctor (b)(6).

The trial counsel will swear you in.

[END OF PAGE]

speaking with anyone in the media. Don't say anything to them that you would not want to have repeated in open court.

WIT: I'm familiar with the media, Colonel. Thank you.

IO: It's 1120. What's the counsel's druthers on this? Do you want to break for lunch and start up after lunch with the next witness, or do you want to push forward?

CC (MR. HIGGINS): Break, sir.

CC (MR. ZIMMERMANN): Break, sir.

TC: Sounds good, sir.

CC (MR. HIGGINS): Next witness is?

IO: Go ahead. The question is the next witness?

TC: That depends, sir.

IO: That depends.

TC: We'll figure that out during the break.

IO: All right. We'll take a noon recess here for an hour and ten minutes. We'll go to 1230. It's now 1120, so you get an extra ten minutes. Take advantage of it.

CC (MR. ZIMMERMANN): May I ask --

IO: So we're off the record at this time.

The Article 32 investigation recessed at 1118, 28 January 2004.

The Article 32 investigation was called to order at 1228, 28 January 2004.

IO: This Article 32 will come to order. All parties who were present when the court recessed are once again present. Accused and counsel are all present.

Captain Francis, do you want to call your next witness?

TC: Yes, sir. The government would like to recall Doctor

(b)(6)

CC (MR. ZIMMERMANN): Before she does that, can I just get some instruction from the investigating officer on what policy you want and what procedure you do. When you have a witness who's going to come back and testify -- we would object if she's just going to come back and state what she said on her direct -- on her previous testimony.

IO: Well, I would hope that that would not happen.

CC (MR. ZIMMERMANN): Okay. It would have to be something new.

IO: I would hope so. I mean, I don't want to keep going back and forth like a tennis match. You know then -- you know, back and forth. There's no point in that.

CC (MR. ZIMMERMANN): I'm not sure if you're going to believe something if you hear it twice instead of once.

IO: Or disbelieve it if I hear it more than once.

CC (MR. ZIMMERMANN): We'll be objecting if that does occur.

IO: All right.

We're going to cover new ground I would hope.

TC: Yes, sir.

IO: All right. Call your witness.

TC: Sir, do you want me to re-swear her.

IO: No.

Lieutenant Colonel (b)(6) I'll remind you you're still under oath in this matter.

WIT: Yes, sir.

[END OF PAGE]

REDIRECT EXAMINATION

Questions by the government:

Q. Ma'am, there's just a few areas that I want to re-cover with you --

IO: Hold it. Did you say re-cover?

Q. Well, cover with you to get clarification.

A. Okay.

Q. First of all, let's talk about your experience with doing autopsies on bodies that are decomposed. Please explain to the IO what type of experience that you have in those type of situations.

A. The majority of the experiences that -- aside from the scenario that was presented yesterday where bodies are found several days after in the fields or wherever, a good many of my cases, a large portion at any rate, come from countries all over the world to Germany where I am for autopsy, and even from different areas in Europe where they often don't use refrigeration. This is particular in the cases from down range, so they do have varying degrees of decomposition. Often they are fairly well decomposed. So I have seen a great many bodies that have been decomposed.

Q. Now, I want to just address the feces of (b)(6). Did you examine his bowels?

A. Yes.

Q. And did you have any findings there?

A. I remember being impressed given the history that we had of the difficulties that he was having with defecation, that the little bit of feces that I was able to see was relatively normal looking in terms of -- you know, given the decomposition process.

Q. What do you mean by "normal"?

A. No dark discoloration, no obvious looseness, relatively normal, what we would see on cases -- on many cases.

Q. Let's talk about the abdomen area. And you heard Mr. Radelat's description of what he thought that that

was the cause from. Are there other factors that come into play when you're talking about a bruise, especially like a blunt-force type injury that may occur to the stomach that could cause that type of Y-type of bruising?

CC (MR. ZIMMERMANN): Excuse me. She's already testified at length on direct and cross about the abdominal -- what she called a contusion. All she would be doing is just rehashing the same thing. We're going to object to the testimony of that. And I'm going to have to put Doctor (b)(6) back on to tell you what he saw. And we'll just go back and forth until everybody is worn out. So I object.

IO: Okay.

CC (MR. ZIMMERMANN): It's not relevant. She's already covered it.

IO: Well, it may be relevant, but I think your objection is that it's cumulative.

CC (MR. ZIMMERMANN): It is cumulative. As a matter of fact it's --

IO: I'm going to give him some leeway here, but if it looks like he's going down the path too far, then I'll sustain your objection.

You understand the objection?

TC: Yes, sir.

IO: Okay.

Questions by the government:

Q. Ma'am, the question was: If in your experience if there's a blunt-force type injury to the abdomen, have you seen a pattern consistent with that in the past, in your past autopsies, with that type of bruising that you noticed on (b)(6)?

A. Yes. And forgive me, I don't recall discussing this, but bruising can be very different. Sometimes they can reflect the exact pattern of the object, sometimes it can be more extensive especially in areas where the skin is very elastic, such as the abdomen, and it may not

normally reflect exactly what it was that was causing it.

Q. It's your opinion that that was antemortem injury?
A. That's correct.

Q. Okay.

Ma'am, I want to move on to the lungs. Did you do a thorough exam of the lungs?
A. Yes, I did. Except as we said there was no microscopic examination.

Q. Now, you heard Doctor (b)(6) describe how usually scales are used to measure weights. Was that done in this case?

A. No unfortunately, once again, given the environment, we did have problems with our digital equipment. We bring a small digital scale with us. And that also was not functioning along with our printer and the problems with the camera in the heat of the environment. So I was not able to weigh the organs.

Q. Were you able to do an external examination of the lungs?

A. I did an external examination, and I did a thorough sectioning technique to examine the lungs in the standard pattern.

Q. Did you notice anything that would be indicative of pneumonia?

A. No, I did not.

Q. Ma'am, I want to move on the neck region of the injuries that you saw there. Please describe for us the -- because I don't think we really understand what your theory is here -- as far as what in your opinion when the hyoid bone breaks, what is the mechanism that is then causing the asphyxia?

CC (MR. ZIMMERMANN): Objection. That's been gone into ad nauseam.

TC: No --

IO: I don't know if I agree with that characterization as being gone into ad nauseam.

CC (MR. ZIMMERMANN): It's been gone in sufficiently. It does not require repeating what she's already said on the record.

IO: I think he's asking for some clarification here. I'm going to allow. If he starts going to far, then I'll cut him off. He's keeping his questions, if you notice, pretty focused, and he is hitting areas that he thinks need some touching up. I don't have a problem with that. You can do the same if you'd like.

Through the nature of the objection, I'd assume there'd be no cross-examination since it's already been covered.

CC (MR. ZIMMERMANN): Well, do you know what? That's the proper thing for a lawyer to do. But if we're going to be forced into a situation of responding so that we don't have somebody coming in and repeating it, and the last thing that the IO hears is something that you already heard yesterday, we're going to be forced to do that. And I thought that is what your rules were that we were not going to do that. This has been covered.

IO: Just because it may have been covered, there may be some areas that need clarification, and this may be one. I think he's doing a fine job in keeping the questions focussed here. But I think there is going to be more witnesses after this, and I don't think this will be the last witness I hear in this Article 32.

CC (MR. ZIMMERMANN): You're the IO.

IO: Yes, I am.

Questions by the government:

Q. Again, ma'am, hyoid bone breaks, and you have given the opinion that that's some sort of swelling occurred which caused the asphyxiation. Correct, ma'am?

A. Yes. As we discussed yesterday that is a non-common mechanism, which actually at the time of the autopsy I was not even considering, and it is due to the -- the blood, the swelling, and the release of the tissues and the reactivity of the inner layer of the mucosa, which is -- in what I heard your questioning -- it wasn't clear that you understood that. It is the inner lining of the airway that swells and blocks off the airway along with some contribution from swelling on the outside.

Q. So we're talking about the inner mucous of the larynx?
A. The inner, what we call, mucosa. It's the soft tissue that line the inner part of the airway.

Q. And you say -- you use the word "reactive"?
A. That's correct.

Q. Please describe to the IO what you mean by "reactive."
A. That area will become swollen due to various insults whether it's a chemical insult, say, when you get anaphylaxis, a severe allergic reaction to a vaccination of such, bee stings. And it can also -- it's reactive to trauma as well as part of the swelling process.

Q. So, ma'am, are you describing a chain reaction type of thing where you have a broken hyoid bone and because of that it triggers a reactive situation on this inner mucosa?

CC (MR. ZIMMERMANN): Objection. Leading his on witness.

IO: Overruled.

WIT: Yes, I would agree with the way you phrased that.

Q. Do you have any personal experience with that phenomenon?

A. Yes, I have personal experience with swelling of the inner airway reacting to different insults. The most recent one, less than the year ago, was due to a very clearly documented anaphylactic reaction in one of our local clinics, and I performed the autopsy within 24 hours later, yes.

Q. Ma'am, do you have any personal experience of where it was your opinion that this swelling of the inner mucosa caused asphyxiation, and then when you did the autopsy, it had shrunk back to normal size?

A. I wouldn't say that death was due to the asphyxiation in this case. But, yes, there was great difficulty --

CC (MR. ZIMMERMANN): Excuse me. I'm going to object to the relevance. I don't want us to be confused. She just said that it did not result in the death. We're dealing an allegation that that caused the death in this case, so it's not relevant what happened in this other instance.

IO: Do you want to rephrase your question?

TC: Yes, sir.

Ma'am, do you have any personal experience where -- and maybe I'm not using the correct medical terminology here, and please correct me if I'm wrong here -- personal experience whereby you -- have you had any personal experience where you thought the swelling of the inner mucosa led to the lack of oxygen, I guess, in a person's system which then created death and then when you conducted the autopsy you looked at that inner mucosa and it had gone back to, you know, a size, I guess, that wouldn't be swollen or indicative of swelling?

WIT: Yes, in this case it was clinically documented that the airway was swollen due to the anaphylaxis to the point where it was very difficult to intubate. And at the time of autopsy, this swelling actually had gone back to close to normal. So it was very difficult to tell if it had been swollen at all. And essentially, he died.

Q. Now, this reactive mechanism that you described of the hyoid bone and then resulting in the swelling of the inner mucosa, have you discussed that theory with other forensic pathologists?

A. Yes, I have.

Q. Who?

A. Essentially, I have discussions with the various forensic pathologists in the Office of the Armed Forces Medical Examiner.

Q. And, ma'am, did they agree with your opinion?

A. They agreed with the opinion, which has been also part of my training, it's phenomenon I'm experienced with and have been trained in that, yes, when you have swelling of the airway prior to death, and especially in those cases when it's been documented that airway will -- essentially, the swelling will go down, and it will appear close to normal at the time of autopsy, and particularly in those environments when death has occurred a longer period of time.

Q. So, ma'am, on your report when you list that the larynx is normal -- or has no abnormalities, is that what you're referring to?

A. What I was referring to -- not really even considering this as an issue in this case. The larynx I was referring -- or focussed on the laryngeal mucosa, or the inner airway, saying that was normal -- which it did aside from some decomposition changes -- was normal. What I should have done and what I consider the oversight was refer to the soft tissue swelling -- or I'm sorry -- the soft tissue hemorrhage that extended from the hyoid bone fracture along the tissues on the outside of the larynx. And I should have essentially said refer to them in the evidence of injury section like I did with the hyoid bone and say there were no non-traumatic abnormalities. So, yes, I was thinking of the inner mucosa being normal, which it was; but I should have been -- I neglected the hemorrhage that we saw in the photos.

TC: That's all I have, sir.

IO: Okay.

Cross?

CC (MR. ZIMMERMANN): May I have just a moment to check with Doctor (b)(6)?

IO: Sure.

CC (MR. ZIMMERMANN): I'm going to proceed at this time if it please the Investigating Officer.

IO: Go ahead.

RECROSS-EXAMINATION

Questions by the civilian counsel (Mr. Zimmermann):

Q. If I understand your testimony here today, you are now saying that you did a thorough sectioning of the lung?

A. That's correct.

Q. Let me show you Investigation Exhibit 30, the autopsy report, page 3, section C, respiratory system, and tell me if I read this right. I'm going to read everything

- in your report that deals with the lungs. The right and left lungs are normally shaped. Did I read that right?
- A. Yes, you did.
- Q. Does this last sentence go with that, or does it go with the whole respiratory system?
- A. Predominantly with the lungs.
- Q. All right. Let me then continue. Marked autolytic changes preclude definitive evaluation. Did I read that right?
- A. That's correct.
- Q. Where does it say that you did thorough sectioning?
- A. It doesn't, as I wouldn't. Because, I think, as I explained yesterday, it was, that because of the autolysis the decomposition changes, I just do not go into the same detail that I would normally on that saying that I sectioned the lungs. And it was my opinion for this type of report it was not necessary knowing that I had excluded those disease processes that may have been significant with the cause of death. But there were some lesser insignificant disease processes, congestion, edema, and some of those changes that I really couldn't say for sure was there because of the decomposition changes.
- Q. The decomposition of the lungs kept you from making a definitive evaluation of the interior of the lungs. Is that fair?
- A. That is fair.
- Q. So how can you say then today under oath that you were able to eliminate pneumonia?
- A. Because pneumonia would have been readily apparent even with that degree of deterioration.
- Q. How?
- A. It's basically with texture and firmness, you see evidence of what we call consolidation, different colorings, and that does show up with decomposed lungs if you have that kind of a process going on. So if that had been the case, I would have mentioned that. So essentially I left out the significant negatives.

- Q. But you couldn't tell about the other things because of the autolytic changes due to decomposition, but you were able to tell there was no pneumonia?
- A. Yes, absolutely. They are very different processes with very different appearances that you can readily see with the naked eye.
- Q. But if you couldn't tell it with the other things, how could you tell it with -- is what I'm getting at.
- A. Because the changes you see with pneumonia are very distinctive with the naked eye. There would have been no problems seeing that with the kinds of decomposition of what I was looking at.
- Q. Now, I didn't follow what you were talking about about you becoming reactive to a bee sting or somebody being reactive to a bee sting. Can you explain that to me? What were you talking about?
- A. It's talking about the types of swelling that you get that can block off the airway and the reactive changes of the mucosal surfaces, lining on the inner part of the airway.
- Q. What causes the bee sting swelling?
- A. That is a chemical reaction.
- Q. Right. It's not a hemorrhage?
- A. No, it's not.
- Q. It's not anything like what we have in this case; is it?
- A. Well, no. It's actually the same process; it's just the insult is different.
- Q. Except that if you don't have blood remaining in the swollen tissue when you treat the bee sting, it was caused by some chemical reaction. There's no hemorrhaging?
- A. Yes. But the same basic process -- you have swelling of tissues. That's the end result of this reaction so whatever the mechanism, insult, is really does not matter. It would be the same way.
- Q. It doesn't matter as far as causing you not to be able to breathe? It still constricts the airway. Is that what you mean?
- A. By swelling of the tissues, yes.

Q. But what I inartfully was trying to get to though, that when that chemical insult is removed, you would expect that that swelling would be able to go down?

A. No, not necessarily.

Q. It doesn't go down?

A. Depending on the degree of it. Yes, over time.

Q. There's not blood left in there from hemorrhage is my point from a bee sting kind of thing; is there?

A. No. That's correct. Because there's not blood usually involved with a bee sting to the kind of degree I believe you're talking about.

Q. All right. And what we're talking about in the case of (b)(6) is that the swelling, according to you, was from blood seepage, hemorrhage; not from a bee sting or some other --

A. Not direct -- that is part of the process, and it is the fluids that are released from the tissue as the reactive change that causes the inner mucosae to swell up.

Q. Where in here, ma'am, do you use the term "swelling of the inner mucosa"? Do you want to look through there and tell me where that appears?

A. I don't use it because I did not see it.

Q. You never saw the swelling of the inner mucosa even though there was some hemorrhaging, blood --

A. That is correct. That is the whole point because after death that swelling will change and go down.

Q. That's your position, and you're going to stick to it. Right?

A. Yes.

Q. The personal experience that you answered counsel's question about -- did that lead to death? That swelling?

A. The swelling did, yes.

Q. The bee sting led to death?

A. No. This case happened to be a reaction to a vaccination.

Q. So it's more than one --

A. An allergy shot, I believe, it was.

Q. Somebody got an allergy shot and died?

A. That is correct.

Q. So the swelling was caused not from trauma?

A. That's correct.

Q. So it's not the same thing as we're dealing with here. It's not caused from trauma, the blood that's going to stay in the tissue; is it?

A. We're dealing with blood in the tissue; we're dealing with a reactive change that causes swelling. And in this case, it's not direct blood. There is some congestion that will also additionally come from blood in the small vessels. But it's mostly fluid that is released into the tissues.

Q. Now, yesterday when you were discussing the obvious discrepancy between your memory versus what you documented in the autopsy report as to no abnormalities in the larynx, you didn't go into this and tell the investigating officer, Well, I really saw that, and my oversight was neglecting to put the hemorrhage down. You just admitted that that was a mistake to put that there was no abnormality in the trachea, no abnormality in the larynx; and it was just an oversight as you called it. Now we got a different version?

A. Well, the difference being, clearly in the soft tissues associated with the larynx, there was hemorrhage and there was bleeding, and that's what I was referring to. The actual larynx from the very beginning, I believe in my testimony appeared -- the mucosal part of the larynx appeared normal, and it still appears normal. So --

Q. So it wasn't a mistake then?

A. But the larynx is more than just the inner mucosa. It's also the tissues associated with that. And that's what I should have been more specific about in my phrasing of it. And that is what the oversight -- but I never said that I saw an abnormal inner larynx.

Q. So when you saw that there's no abnormalities in the larynx, you only mean the outside of it? Is that what that means?

A. Well, in this particular case because that's where there was abnormality that I could see.

- Q. Why didn't you tell us that yesterday?
- A. I believe I thought I had, but it was apparent that it was not clear.
- Q. How about the trachea? When you say there was no abnormalities in the trachea, is that just on the outside?
- A. No. That would have been the entire trachea.
- Q. When you say the pharynx and the esophagus are unremarkable, does that just mean the outside?
- A. The pharynx and the esophagus. In dealing with the pharynx, essentially, would be the outside and the inside and the esophagus given the decomposition changes that weren't that severe.
- Q. When you say "mouth and lips," do you mean just on the outside -- unremarkable -- I'm sorry -- mouth and lips are unremarkable, does that just mean the outside?
- A. No. I don't believe I said that. So maybe I haven't been clear on this.
- Q. I'm just trying to figure out what your code was, how we know when you say that something has no abnormality or it's unremarkable, if that means the whole organ or just the outside? Because what I'm hearing you say today is that what you meant by having a no abnormality in the trachea and no abnormality in the larynx, you just meant the outside?
- A. That's not what I'm not meaning. I look at both the inside and the outside. But when I phrased the report, I did -- I was focussed on the inner part of it.
- Q. Okay. So I'm going to just try to leave this subject and go to something else with one wrap-up question. With regards to the larynx, as I understand your testimony, you're saying that the mistake you made in the autopsy report was not saying that there was hemorrhaging on the outside of the larynx because the inside was normal. The outside of the larynx itself was normal, but you neglected to mention the hemorrhaging that you to saw from the hyoid bone fracture. Is that a fair summary?
- A. Well, in essence, I mentioned that hemorrhage in the evidence of injury section where I was talking about the fracture of the hyoid bone and the hemorrhage extending into the soft tissues. But I contradicted myself in the standard template when you talk about the normal larynx.

And, yes, the larynx was relatively normal on the inside. But what I would normally do is say, There are no non-traumatic abnormalities; see evidence of injury below. That would have been the more appropriate way to phrase that report.

Q. Okay. Let's just to a different last subject. You talked to government counsel about prior personal experience with swelling that led to asphyxiation. Are you with me on the subject?

A. That's correct.

Q. Are you talking about a bee sting?

A. Bee sting or anaphylaxis, yes.

Q. What you talked about though was a bee sting case and some type of vaccination. What did you call it, the last one you talked about?

A. It was an allergy shot.

Q. An allergy shot. Do you have personal experience where there was trauma to the hyoid bone that led to swelling that led to death? Do you have personal experience with it?

A. No. As I said it's uncommon. And for that I would have to rely on the body of the forensic experience, the body of knowledge. And through that, in training, essentially this was -- I learned this fact that it happens in training as well as in consultation again when I consulted with other physicians in this case.

Q. About how many autopsies a year do you perform?

A. Right now I'm averaging about 150, usually between 100 and 150.

Q. Two a week?

A. It varies. If they come in --

Q. You personally do two a week, and you're the supervisor?

A. I can do as many as five a week and none in the next week. It varies.

CC (MR. ZIMMERMANN): One moment with counsel, sir?

You do not have any personal experience with this, but you say you have consulted with other physicians, other pathologists, about this issue of swelling?

WIT: Yes.

Q. Okay. The question, as I have it written down and you were asked by government counsel, who did you consult with. And you never gave him any names. Let me ask the same question again. Who did you consult with on this case?

A. Doctor Craig Mallek [ph].

Q. And where would we find him?

A. He's the Armed Forces Medical Examiner. And this a case that was discussed with he and the staff, and I can give you most of those names.

Q. Okay. You talked to that doctor. What other doctor did you talk to?

A. Off the top of my head, it was predominantly the doctors in that office.

Q. Who were they?

A. Doctor Craig Mallek.

Q. Okay.

A. Doctor Lee Rouse [ph].

Q. Okay.

A. And they talked amongst themselves as well. Doctor Lou Finelly [ph].

Q. You talked to Doctor Lou Finelly?

A. I did not talk to him -- actually, I believe I did at a later date.

Q. My question is before you reached this conclusion, who did you personally talk to? You testified that you consulted --

A. I reached the conclusion before. I was basically getting back up on the issue of this laryngeal swelling with a traumatic injury. This was not something I had experienced before.

Q. So this is the first autopsy you ever did where you found this?

A. Presuming this is the mechanism that -- in this case, I have never had an autopsy -- asphyxial death where this was the mechanism. They've all been compression of the airways, compression of the -- the more common ones.

- Q. And even though you didn't see any abnormality on the inside like you just testified to a few minutes ago, in combination of your testimony from yesterday, you arrived at a conclusion asphyxiation from strangulation because you could think of no other cause of death. Am I right?
- A. Because I excluded any other cause of death, yes.
- Q. So this was the only other cause of death that you could think of even though the interior of the wind pipe, the interior of the airway, appeared normal?
- A. Yes, that's correct. Because it does in most asphyxial cases I have.

CC (MR. ZIMMERMANN): I don't think any more questions.

IO: Mr. Higgins?

RECROSS-EXAMINATION

Questions by the civilian counsel (Mr. Higgins):

- Q. Doctor, yesterday I questioned you. Right?
- A. Yes.
- Q. I think everyone did. And I asked you questions about the fact that you got in this weekend. Right? You got in this past weekend?
- A. That's correct.
- Q. And you saw some new photographs from -- I'm going some place. I know I've covered some of this.
- IO: I'm not objecting. Maybe Mr. Zimmermann might, but I'm not objecting to it.
- Q. And you saw photographs that NCIS had taken for the first time?
- A. That's correct.
- Q. And you discussed scenarios with government counsel for the first time?
- A. No, that's not correct.
- Q. Not what you told me yesterday. You didn't testify that you recently learned about the scenario involving the dragging --

TC: Objection, sir. Is counsel going to be the witness?

CC (MR. HIGGINS): It's called a leading question.

IO: We're not going to bicker among yourselves. The objection is overruled. It's a proper question.

Q. You didn't testify that you had just recently learned about the government's theory and that there had been a dragging by the throat and that that's what led you to your conclusions that you testified to regarding the swelling?

A. To be honest I don't remember what I testified to yesterday, but I received more information in terms of more detailed experience of the dragging. But prior to that, I spoke to counsel a few months ago. And that was the issue that had come up. It was just not as detailed as what I heard this weekend.

Q. When did you talk to Doctor Mallek?

A. I've talked to him on several occasions, from the time of the autopsy, various times throughout those months.

Q. Last time you spoke to him?

A. Actually, I spoke to him this morning.

Q. Doctor Rouse?

A. It's been a few weeks.

Q. Doctor Finelly?

A. I believe that was November time frame. We've had other conversations since then though, but I couldn't tell you when they were.

CC (MR. HIGGINS): Thank you.

No further questions.

IO: Lieutenant Folk?

DC (1STLT FOLK): No questions, sir.

IO: I have a couple questions.

EXAMINATION BY THE INVESTIGATING OFFICER

Questions by the investigating officer:

Q. Did I understand you correctly in response to one of Captain Francis' questions that -- I'm going to paraphrase here, but I'm going to try to get as close as I can to what you thought you said was -- that it was clinically proven that intubation was difficult?

A. Yes.

Q. Where did you receive that information? Intubation of (b)(6) I presume, is what you meant.

A. No. I'm sorry. This was on the case that I was referring to, the anaphylaxis case, that I had recently. And it was clinically documented that he did have swelling with the airway so this was something at least I knew before going into it. So you have swelling of the airway, and it goes away by the time of autopsy.

Q. And this was not in (b)(6) case, but in another case?

A. That was not (b)(6). No. I'm sorry. That was more just an example of this instance where I've experienced the swelling going away.

IO: Okay.

I have no questions.

CC (MR. ZIMMERMANN): I'm glad you asked that. Can we have just a moment? Is there anybody else -- can we have just a moment to see if we're going to call Doctor (b)(6)?

IO: Sure.

TC: Sir, can Doctor (b)(6) step down?

CC (MR. ZIMMERMANN): Well, we might be able to save time by not calling him, but getting the question for her from him.

IO: Let's stand in recess. I'll give you five minutes.

The Article 32 investigation recessed at 1308, 28 January 2004.

The Article 32 investigation was called to order at 1313, 28 January 2004.

IO: This Article 32 will come to order. All parties who were present when we recessed are again present. All counsel and accused are present with the exception of Captain Studenka. However, Lance Corporal (b)(6) civilian -- and Captain Jasper, both military counsel for their respective accused. However, civilian counsel for those accused, Lance Corporal (b)(6) and Major Paulus, are present. Captain Jasper has just walked in the room.

Mr. Zimmermann?

CC (MR. ZIMMERMANN): Thank you, Mr. Investigating Officer.

RECROSS-EXAMINATION

Questions by the civilian counsel (Mr. Zimmermann):

Q. Doctor (b)(6) I just want to explore one area with you, ma'am.

You testified that you, out of all the thousand or so autopsies that you had performed, this was the only one that you'd ever done where you found asphyxiation from trauma to the larynx area, that is asphyxiation due to swelling. The first one in over a thousand autopsies that you personally experienced. Is that correct?

A. Essentially, except for the fact that this is the first time that mechanism of swelling was a consideration.

Q. Okay. And you further explained that your reliance -- that you had to rely on something in order to eliminate or preclude other causes of mechanisms of death, and that was figured into your ultimate conclusion to have that. Right?

A. That's correct.

Q. Process of elimination, basically?

A. That's correct.

Q. And that was based on some research or training that you had had, some reading that you had done. Correct? Isn't that what you said?

A. I'm not sure --

Q. Well, you said in answer to a question, Well, I haven't experienced it myself, but I've read about it; the

research says that this happens, and I'm relying in part on that research. Is that accurate?

A. In relationship to that issue of the mechanism and the swelling, yes.

Q. Would you please tell me then dealing with the issue that swelling in the larynx area due to trauma -- there's a helicopter over. Let me wait a minute -- on the issue of swelling from trauma to the larynx and the airway, what reference materials have you read, what research materials did you rely on that says that the swelling will subside to normal or near normal? Give us the names of the reference materials that you are relying on, please.

A. The -- essentially, in terms of it going back to normal?

Q. Yes, ma'am. That's the critical issue in this matter.

A. I'm not aware of any -- the reference material. That was not the reference material I was speaking to that I used for this case.

Q. So there's no reference material that says a crucial factor --

A. It's basically a part of training, something you learn in training from respected forensic pathologists with a lot more experience than you have during the time of training.

Q. How did it get to you?

A. Basically, a body of knowledge, and essentially it's in my training. And I've known that for some time.

Q. I guess, what I'm saying is if you didn't experience it yourself, and you didn't read it in a reference book yourself, how did that knowledge get transferred inside your head.

A. Well, essentially, I must be confused in what you were asking me. I have experienced cases where there is expected or documented swelling that goes back to normal --

Q. From trauma?

A. At the time of death. Specifically -- oh, okay. If we're just dealing with trauma, no, I don't believe I've seen a case of trauma with that.

Q. Ever with this mechanism?

A. It is possible that I've had -- I've had enough cases with neck trauma. It's possible that there had been swelling, and I'm not able to appreciate it. But that was not an issue that I would have even considered at that time because that was not an issue. So I can't say I've never seen the phenomenon before, but it's not one I would have identified or paid attention to.

Q. I'm not trying to trick you. Let me try again, and if it's not clear, tell me and I'll try it again.

A. Okay.

Q. I want to know whether the autopsy on (b)(6) on the 10th of June 2003, isn't it true that that is the first autopsy in your life dealing with trauma, not bee stings or injections, but trauma leading to swelling where you concluded that it was the mechanism that led to the cause of death was the swelling of the obstruction of the airway from trauma, isn't it true that this is the first and only case you personally have experienced? Yes or no?

A. That is correct except for the fact that this is a mechanism that I feel has the most plausible --

Q. Okay. That's not the question, Doctor. What was unclear about the question?

A. I did not say definitively with reasonable medical certainty that this particular mechanism was the cause here. But it's consistent -- this process is consistent given this scenario, yes.

Q. Now, I'm confused.

A. Okay.

Q. And, perhaps, I'm easily confused. But we're talking about a homicide prosecution here. This is serious business. You testified yesterday to a reasonable medical certainty that strangulation leading to asphyxiation was the cause of death and you based it on a broken hyoid bone and the associated hemorrhaging and swelling. That's what your testimony was. Are you telling us now that's in error?

A. That is just different than what we just talked about. You were talking about the mechanism. Yes, I testified with reasonable medical certainty that strangulation was the cause of death based on the hyoid bone and the associated hemorrhaging that makes it clear that this is

not an artifactually fractured hyoid bone. But that is what I'm saying with reasonable medical certainty.

I'm saying that the mechanism due to the swelling and the obstruction as the mechanism of death, this is a scenario that I've entertained for the first time in a strangulation case.

Q. First time in your life?

A. Probably.

Q. Okay. Just so I'm clear, the way you arrived at this was because you were able to preclude other mechanisms, this was the only -- in your opinion was the only feasible explanation and it was based on -- I thought you said -- your reference materials that you had read before you did this autopsy. Isn't that true?

A. And that's correct because of this particular scenario.

Q. Okay. Now, let's go back to what I started. Please tell me what reference material you read that says that trauma to the larynx that results in hemorrhage that results in swelling that results in airway obstruction that leads to death and the findings on autopsy would show no obstruction of the airway because the swelling would have subsided to normal. Where did you learn that so I can go read it and correct myself?

A. As I mentioned yesterday, the literature that I've read that a fractured hyoid bone can lead to swelling obstruction of the airway, even though it's uncommon, can ultimately end up in death, I believe I listed that literature yesterday, at least some examples of it, Kauffman and Knoll [ph], and The American Surgeon, Randy Hanslicks' [ph] book on forensic pathology, one of the recent books, Hanslicks and Graham.

Q. Let me stop you there because I think you're answering a different question.

A. But I have not seen anything in literature that talks about -- now, I may have read it in some of the standard texts, but I just off the hand am not sure where that came from. I think it's more from training, not a specific piece of literature that I can identify.

Q. Let me tell you what's bothering me, and I want you to straighten me out. Your testimony that the swelling will not remain in that kind of case at autopsy. In other words, it will go back to normal. That's the

point that's making this whole thing cloudy and uncertain to me. And I want to make sure some young man doesn't go to the penitentiary on that kind of stuff. Where can I go read something that authoritative, researched and peer reviewed that says that you can do an autopsy and even though someone died from asphyxiation because there was swelling from hemorrhaging, you as the pathologist will not see that upon autopsy because the swelling will go back to normal. Where can I read that.

A. Sir, I understand your pain, but what I'm saying is that I cannot give you that source.

Q. Why not?

A. There may have been a text where I read it, but where I got most of this information is in forensic training and the basic body of knowledge that has been discussed with other pathologists that have seen the same phenomenon.

Q. Do you think that that body of knowledge that you relied on would be one that would be known to a pathologist who was board certified in 1962 and has done over 2000 autopsies?

A. It may or may not. It's not something that people come across that often.

Q. But it's in this body of knowledge?

A. Just like -- pathologists have different levels of experience, different kinds of training, you can talk to one -- one will say one thing, another will say another thing. And it's just based on experience, the body of knowledge they are used to, and their text, hopefully if it's in there to support it. And believe me, if I could come up with one in my mind right now, I would.

Q. I bet you would. But I guess the bottom line is if somebody's put in a position of having to make a decision on this, he or she is going to have to determine which dueling pathologist has the greater experience, knowledge, and credibility. Right?

A. And that's often the case in a great many of trials involving forensics.

CC (MR. ZIMMERMANN): Thank you very much.

IO: Mr. Higgins?

CC (MR. HIGGINS): Not at this time.

IO: Lieutenant Folk?

DC (1STLT FOLK): No, sir.

IO: Captain Francis?

TC: No, sir.

IO: Can this witness be excused?

CC (MR. ZIMMERMANN): Lance Corporal (b)(6) yes.

CC (MR. HIGGINS): Yes, sir.

IO: Subject to being recalled?

TC: No, sir.

IO: Lieutenant Colonel (b)(6) it appears now that your testimony has come to a logical conclusion so I'm going to dismiss you, and you're free to resume your duties, subject to the admonitions that I gave to you earlier.

WIT: Okay. Just to be clear, that means to stay in the area of San Diego?

IO: No. You're dismissed. You're free to go about your daily duties wherever they may be whether they are here at Pendleton or elsewhere.

WIT: Okay. Thank you, sir.

The witness was excused and withdrew from the courtroom.

IO: Okay.

Captain Francis, do you want to call your next witness?

CC (MR. ZIMMERMANN): Just for everybody's information we request permission to have the investigating officer release Doctor (b)(6)

IO: Oh. You're free to go as well if you so choose.

Let's stand in recess right now.

The Article 32 investigation recessed at 1331, 28 January 2004.

MJ: All right. We ready to proceed with the next deposition?

An affirmative response from all counsel.

MJ: Once again, I'd ask all parties to stipulate and agree to waiving the reading of the appointing orders, qualifications of counsel, accused rights, and the general statement statements regarding objections.

An affirmative response from all counsel.

MJ: You may proceed.

Sergeant (b)(6) U. S. Marine Corps Reserve, was called as a witness by the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name?

A. (b)(6)

Q. And you're currently a sergeant in the United States Marine Corps, or the Marine Corps Reserve?

A. Marine Corps active.

Q. So you're active duty?

A. Yes, sir.

Q. When's your current EAS?

A. December 8, 2004, sir.

Q. You're currently assigned to 2d Battalion, 25th Marines?

A. Yes, sir.

Q. And what is your current MOS?

A. I'm 0121, admin clerk.

Q. Before we go any further, originally, you were charged with a number of offenses for a special court-martial. Correct?

A. Yes, sir.

Q. And you retained -- your attorney was Mr. Brahms?
A. Yes, sir.

Q. And he was your counsel, and your military counsel was --
A. Lieutenant --

Q. Was it Shepherd?
A. Yes, sir.

Q. Now, I've contacted Mr. Brahms, and I let him know what we were doing here today, and I gave him an advanced copy of the immunity documents that I just handed to you. Do you have any questions at this point about that?
A. No, sir.

Q. So you're caught up to speed with your attorneys?
A. Yes, sir.

Q. All right. So let's start. Now, how long have you been in the United States Marine Corps?
A. Since '95.

Q. Now, have -- do you have any type of history of misconduct?
A. No, sir.

Q. No prior NJP's?
A. Yes. I got an NJP. I'm sorry. Yes, sir.

Q. What was that for?
A. It was in Japan, it was for the unit diary clerk -- I was personnel chief and this Marine had done something with the unit diary. Like, recruiting bonus points, and we, I guess, both got in trouble. I guess I'm supposed to --

Q. So what was the charge?
A. Tampering with the unit diary.

Q. False official statement or something?
A. Not a false statement. Just tampering with the unit diary. Like, adding recruiting bonus points to --

Q. When was this?
A. Back in the '98, sir.

Q. You received any Page 11's?
A. It was just like not recommended for promotion due to that NJP.

Q. What rank were you at the time?
A. A corporal.

Q. So regardless of that, you did get promoted?
A. Yes, sir.

Q. Now, you were deployed in support of Operation Iraqi Freedom. Correct?
A. Yes, sir.

Q. And your unit was 2/25?
A. Yes, sir.

CC[MR. HIGGINS]: Excuse me. Home of record, and telephone number.

TC: Sorry for that.

Questions by the prosecution:

Q. Can you give us your home of record please.
A. (b)(6)

Q. Zip code?
A. (b)(6)

Q. And what's your current home phone number?
A. I don't have a home, but I have a cell phone. It's (b)(6)

Q. (b)(6)
A. Yes, sir.

Q. Okay.
A. (b)(6)

CC[MR. HIGGINS]: (b)(6)

WIT: Yes, sir.

CC[MR. HIGGINS]: Thank you. I apologize for interrupting.

TC: No problem.

Questions by the prosecution:

Q. Now, prior to actually getting into country, meaning, getting to Iraq, you went to Camp Lejeune. Right?

A. Yes, sir.

Q. Did you receive any type of Law of War or EPW handling instruction?

A. No, sir.

Q. None?

A. No, sir.

Q. Did you attend any classes given by Major Paulus on that subject?

A. There were classes, sir, but it wasn't on EPW. It was like say if we were to catch, if we were on a patrol or something and we catch somebody, what to do, I guess you know like -- it was just -- not on EPW's, it was not like EPW handling. It was just like, if you catch somebody take them.

Q. Were you ever told how you were supposed to treat one?

A. No, sir.

Q. Did you hear of the golden rule at any time?

CC[MR. HIGGINS]: Objection.

WIT: The golden rule, sir?

Questions by the prosecution:

Q. Treat them like you want to be treated? Do you recall that?

A. That's with anybody, I guess.

Q. Did you hear that from any of your superiors in relation on how you should treat EPW's?

A. No, sir.

Q. Let's think back farther than that. Prior to being at Lejeune, had you received -- any time during your training as a United States Marine, any instruction at all on the Law of War?

A. No, sir.

Q. Had you ever heard of the Geneva Convention?
A. Yes.

Q. What did you think that pertained to?
A. Well, I guess Laws of War.

Q. Before you got to Iraq, how did you think that you need treat an EPW that was in your custody?
A. Well, I didn't even know what we were going do, sir, so --

Q. Let's just say random EPW, he's in your custody, what level of treatment did you think you owed to such a person?
A. I guess like I would wanted to be treated, I guess.

Q. Do you think you could strike them unprovoked? That if they didn't provoke you that you could just hit them?
A. No, negative.

CC[MR. HIGGINS]: Objection. Compound.

Q. Did you think that -- well, you answered that question. All right. Do you recall when you actually arrived in Iraq?
A. It was like the 7th. We, myself and my Marines, the admin, the whole battalion went first and they didn't have any room for us, so it was like me, myself, and Staff Sergeant (b)(6) was there and I'm just going to say probably 10, 11 more Marines, and a few of our corpsman. We were left back at Camp Shoot [ph]. And we arrived like seven days later or something like that.

Q. You ended up at Camp Whitehorse. Right?
A. Yes, sir.

Q. When you got to Camp Whitehorse, were you immediately assigned to the detention facility?
A. Yes, sir.

Q. When was it that you arrived at Camp Whitehorse?
A. I think the morning of the seventh.

Q. Which month?
A. April, sir.

Q. At that time, when you arrived, who was staff NCOIC at the detention facility?
A. Staff sergeant -- I can't recall his name right now.

Q. Was it (b)(6)?
A. Yes, sir.

Q. Low long was it after you got assigned there that Staff Sergeant (b)(6) became the staff NCOIC?
A. I thinking a few days, probably like a week later because I think he got sent back because of a hernia.

Q. Who are you referring to?
A. Staff Sergeant (b)(6). I mean, I remember he got sent out for something, so like a week, guess.

Q. Okay. And when you arrived there, who was the OIC?
A. Major (b)(6) sir.

Q. Now, from the time you arrived up until June 3, 2003, what was the process during the indoctrination phase? What was your understanding of the process you were supposed to employ?
A. Well, we had -- the Marines that would check, like strip search them for weapons or whatever. You had security of a couple of guys around just making sure that the prisoner didn't do anything.

Q. What do you mean by "security"?
A. I guess, security, just make sure he, like, I don't know, do something to a Marine that's checking on something.

Q. Was this with the weapons or just standing?
A. I mean, you had your weapon all the time, so, yes, we had our weapons.

Q. What was your condition at the detention facility?
A. Four.

Q. You didn't have a magazine?
A. We did have a magazine?

Q. Okay. All right. And this was during the strip searches?
A. Yes, sir.

Q. Okay. So you do a strip search, who would generally do the strip searches?

A. It would be Sergeant Pittman and Lance Corporal (b)(6), sir.

Q. Why was that?

A. To my understanding it was because -- well, they were there first. They left before we all did, I guess because they both had corrections before. I really don't know, but this is what I'm thinking.

Q. That was in place when you got there?

A. Yes, sir.

Q. Did they teach you how to do it?

A. Not really. Just from me looking, I guess because I never -- I probably did two in my whole time there.

Q. Okay. Did they -- did either of them provide you any specific instruction on how to do it?

A. No, sir.

Q. How about any instruction on how to handle the EPW's?

A. No, sir.

Q. Again, coming up to June 3rd, prior to June 3rd, was it ever a time that you observed Lance Corporal (b)(6) or Sergeant Pittman strike an EPW?

A. Not strike. It was like Lance Corporal (b)(6), and it wasn't -- he didn't strike one, he would just -- I was security just standing back and he told the guy to strip, and he wouldn't strip. He said no. He said you need to strip, you need to take it off, and he tried to run off. So we just grabbed him and kind tumbled with him, and I we picked him up and then he did it he took it off. Not strike him.

Q. Kind of wrestled him?

A. Yes, sir.

Q. That's the only occasion?

A. Yes, sir.

Q. Um --

A. I was going the COC. For the first week or two and a half weeks I was there, at the beginning, since I'm there -- I was the senior admin away from my gunny. There were two gunnies there. I was the only senior man from the 01 field. They wanted me to go to the COC. So

I left for a couple of months to the COC, and then I came back at the end, like, two or three weeks after -- before everything was done. Then, that's when I came back again. But I was gone, and my job was at the COC, sir.

Q. Okay. Again, talking about prior to June 3rd. After indoctrination, the next phase was isolation. Right?
A. Yes, sir.

Q. That's where the 50/10 technique was put into place.
A. Yes, sir.

Q. Before the HET Team arrives. Right?
A. Yes, sir.

Q. Now, during that -- again, just during the isolation phase, did you ever see any Marines strike an EPW in order to get them to comply with 50/10?
A. No, sir.

Q. Did you ever strike anybody to comply with 50/10?
A. No, sir. But I told everybody one time with me -- (b)(6) was searching --

Q. Again, this isn't. Okay.
A. This is almost at the end, and he came off to walk and right behind it was concertina wire, so they were like really close, sir. So he came up, kind of like in front of Lance Corporal (b)(6) and he told them, you need to go back, so the guy grabbed his finger?

Q. Okay.
A. So I slapped his hand down, and I said, don't do that.

Q. Okay.
A. So that was the only --

Q. Was that (b)(6)?
A. Yes, sir.

Q. We're talking about Friday June 3rd. So we're not talking about (b)(6)?
A. Okay, sir.

- Q. Okay. So back to my original question. During isolation, did you ever strike an EPW to get them to comply?
- A. No, sir.
- Q. Did you have EPW's that didn't want to comply with 50/10?
- A. No, sir.
- Q. They would most -- all of them would comply with --
- A. I don't know, sir, were the name of 50/10 came about because there was no 50/10. I just started hearing 50/10 like here.
- Q. Okay.
- A. From what they told us, it was like there would be -- the HET Team wanted us to make them stand for a while. And my shift, sir, I thought I was -- they would stand no 50/10. They would have to stand up more than they were sitting, but it wasn't no time set. They would sit down, they would get up, they would sit down, and, you know, there was no 50/10. I don't know where that came. Not to me, sir.
- Q. What was it that they called it?
- A. They would be up, but it wasn't no 50/10. They would be up a little and then --
- Q. Well, what was your understand of the purpose of it?
- A. Because the HET Team wanted them, I guess, tired. When they get there, they just wanted to say whatever the questions they had, they would be tired, and just want to comply.
- Q. Did you have a name that you called it? If you didn't call it 50/10 what were you calling it?
- A. There was no name, sir. I didn't have a name for it, sir.
- Q. Well, during that period of time, did you have prisoners that didn't want to stay up all night standing all night?
- A. You could go sit down, but you tell them to get up.
- Q. Now, were there any that when you told them to get up, wouldn't comply?
- A. Not at first, but they would get up.

Q. Well, how did you get them up?
A. We'll just tell them to get up. We would just scream at them. Hey, get up.

Q. Okay. And that would work?
A. I mean, not right away, sir. You tell them to get up, you would have to tell them like a few times, but they'll get up, sir.

Q. Did you ever have to put hands on them to get them up?
A. No, sir.

Q. Who was in your crew?
A. Lance Corporal (b)(6), and Lance Corporal (b)(6). But I had, at first, it was (b)(6) and Corporal (b)(6). I think first, and then it was -- at the end, it was Lance Corporal (b)(6) and Lance Corporal (b)(6).

CC[MR. HIGGINS]: (b)(6) and who.

WIT: Corporal (b)(6) sir.

Questions by the prosecution:

Q. Let's fast forward now and talk about (b)(6). All right?
A. Yes, sir.

Q. Okay, 3 June 2003 is the date he comes into the camp.

CC[MR. HIGGINS]: Objection. Leading.

Questions by the prosecution:

Q. What do you do when he comes in? What are you doing when he comes into the camp?
A. I don't know. I can't recall, sir. I don't know if I was on shift, if I was off. I mean, I think I was off, I just went to -- because it was three or four of them that came in at the same time or whatever. So I went out to help, I guess.

Q. I want to show you a photograph. Let's see, it's Deposition Exhibit 3. Do you recognize that individual in that photograph?
A. Yes, sir.

Q. Who is that?
A. That's (b)(6) sir.

Q. Is that a fair and accurately depiction of the way he looked when you saw him at the detention facility?
A. When he first came in? No.

Q. No? Okay. Well, how is it different?
A. He's dead.

Q. Anything else?
A. He had some stuff.

Q. You're pointing to the scratch on his face?
A. Yes, sir.

Q. Was that on his face when you first saw him?
A. I don't think so. I can't remember.

Q. Other than that abrasion and the fact that whether that indicates he's dead, is that a fair and accurate depiction of how he looked? His appearance?
A. Yes, sir.

Q. Thank you. Okay. So again, when (b)(6) first came into the camp, you can't recall what you were doing?
A. No, sir.

Q. You were sitting there when Lance Corporal (b)(6) testified at the 32?
A. If I was --

Q. Were you in the court room?
A. No, sir.

Q. Okay. Well, he testified that you were providing security when he conducted the search of (b)(6)

CC[MR. HIGGINS]: Objection. Hearsay. Leading.

Questions by the prosecution:

Q. Do you recall that?
A. I was there, yes, sir.

Q. So you were there when he was doing the search?
A. Yes, sir.

Q. What were you doing when you were there?
A. I was standing back with my weapon, making sure they don't --

Q. Now, is your weapon in Condition 4?
A. Yes, sir.

Q. How are you holding your weapon?
A. Just like --

Q. Holding it at the alert?
A. Yes. I mean, it just hangs. I had one hand.

Q. Okay. All right. Now, Condition 4, let's just make sure we're talking about the same thing, here. What do you mean by Condition 4?
A. The weapon on safe, the magazine out.

Q. The magazine out?
A. Yes.

Q. Of the chamber.
A. Yes, sir.

Q. All right. So you're standing there providing security, is anybody else there other than you and (b)(6)?
A. It was indocing. so it was like a lot of people. Staff Sergeant (b)(6) was like sitting probably right behind me.

Q. Was there, do you recall if any of the corpsman there?
A. Yes. Doc (b)(6) was there.

Q. All right. So what happen during the search? Anything of significance?
A. Like I said before, sir, he was coming off the wall. He came off and (b)(6) told him to get back, don't come off the wall. He put a finger like this, so he grabbed it.

Q. Okay. Now, you just held up your right hand, held up your right index finger and indicated that your left had that he grabbed.
A. He came and grabbed it. I don't, I mean, I think it was his hand -- or his right hand. I'm sorry. He grabbed his finger like this so I slapped his hand down. It was just a reaction. I didn't know what he was going to do -- if he pushed a Marine, sir, I mean, the concertina wire was right there, sir. So I slapped his hand down

and told him don't, you know.

Q. So he grabs a finger, and you slap (b)(6) hand down?

A. Yes, sir.

Q. Is (b)(6) clothed at this time or is he naked?

A. I think he was clothed.

Q. All right. So he slaps a hand down. What happens next?
A. He just slapped his hand down and we tell him get back. We were screaming and I was telling him to get back to the wall, and he got back to the wall and everything -- just did his thing, sir. He took his clothes off and he put them back on just whatever Lance Corporal (b)(6) was telling him to do.

Q. Did he appear cooperative?

A. He --

Q. Other than the grabbing of the finger?

A. He did what he had to do, sir, after that.

Q. Did you see him grab (b)(6) any other time?

A. No, sir.

Q. When he reached out and grabbed his finger, did you or did you see anybody else punch or kick (b)(6)?

A. No, sir.

Q. So if (b)(6) testified that he observed you doing that --

CC[MR. HIGGINS]: Objection.

Questions by the prosecution:

Q. -- would that be incorrect?

A. As --

MJ: Hold on just a second, sergeant.

CC[MR. HIGGINS]: Testifies to the voracity, in other words, his testimony.

MJ: You can go ahead and answer the question, sergeant.

WIT: I slapped his hand down.

Questions by the prosecution:

Q. Well, other than that, did you punch (b)(6) at all?
A. No, sir.

Q. Did you observe someone else punching him?
A. No, sir.

Q. Okay. So search is being conducted, anything of significance that happened during that search?
A. No, sir.

Q. Any other gestures by (b)(6) that might be --
A. No, sir.

Q. All right. So search is conducted, what happens next?
A. He finished. He goes back into one of the rooms because I guess when they -- they were also when he got there, they wanted to put him separate from the other one so they won't talk, I guess. The HET Team. So they he came to one, and I can't recall which one, and they were like just put him back in the room until --

Q. After the strip search, his clothes are put back on. Right?
A. Yes, sir.

Q. And were the flexycuffs put back on his wrist?
A. Yes, sir.

Q. Are they in front or back, do you recall?
A. I think back, sir.

Q. And was the sandbag placed on his head?
A. Yes, sir.

Q. So at that point, he's taken into the isolation phase?
A. One of those rooms.

Q. So after that happens, when is the next time you see (b)(6)

A. Probably, like my shift -- when my shift cam. I only seen him twice. That time, and the time I was on my shift, and that's it.

Q. Okay. Let's talk about that next time you saw him, was the next day. What were your observations of him?
A. Well, he was just laying there, sir.

Q. Okay. Laying where?
A. On the floor.

Q. Outside, inside?
A. Inside, sir.

Q. In one of the holding cells?
A. Yes, sir.

Q. Did he still have the flexycuffs on his wrists at that time?
A. I think he did, sir.

Q. So in the back?
A. Yes, sir.

Q. Did he have the sandbag on his head still?
A. I can't recall, but I would say, yes.

Q. So how is he laying.
A. He was laying on the floor like this?

Q. On his side?
A. Yes, sir.

Q. What time of day was this?
A. Afternoon, sir, I don't know.

Q. Still daylight?
A. Yes, sir.

Q. With the sandbags on his head, you can't see his face?
A. Right.

Q. But just by how his body was, did it appear like he was sleeping?
A. No. He would move, sir, but he would just -- just wouldn't get up.

Q. What was he moving?
A. Lying, sir.

- Q. What was he moving?
A. No. He would move. He wasn't like sleeping or anything. He was fine, he just wouldn't get up.
- Q. What part of his body was he moving?
A. I meaning everything. He would move to one side or move to the other side.
- Q. Was he making any noise?
A. No, sir.
- Q. Was this prior to when the HET Team had interrogated him?
A. I think it was before, sir, but then after that I never seen him again after that. He passed and everything, but I mean, this is what I heard. He --

CC[MR. HIGGINS]: Objection. Hearsay.

Questions by the prosecution:

- Q. You said it was in the afternoon. Do you recall when the HET Team actually arrived?
A. Not on my shift.
- Q. How many hours had passed from the time that -- from when the search was conducted of (b)(6) how many hours had passed from then until when you were now guarding him?
A. I think my shift was probably like at noon, sir. Four hour shifts.
- Q. Do you recall if it was dark when (b)(6) came in?
A. When he came into the thing, it was dark, sir.
- Q. Do you recall what time it was?
A. No, sir.
- Q. Was it after midnight.
A. No, sir.
- Q. Before midnight?
A. Yes, sir.
- Q. So we're talking about 12 hours here?
A. Yes, sir.

Q. And he's still in isolation after 12 hours?
A. That's what they told us to do, sir. I mean, until the HET Team arrived.

Q. Okay. Now, did you -- all right. Well, you described that he was laying there and that he had moved side to side, but you didn't hear him saying anything or making noises. Did he drink anything during that time?
A. Sir, I put, like, I don't think it was that type because we had -- I know they were drinking water because this was just me that did it because I told him, I said I'm going to give you water and he said no. So I put the bottle right next to him. I said if you want it, just let me know, but he wouldn't, sir.

Q. How would he drink it if his hands were --
A. That's why I was trying to give it to him, sir, and he wouldn't take it. I was going give it to him.

Q. Did you take the sandbag off his head?
A. Yes, sir. Like do you want water, and he would say no. So I placed it back and put the bottle there.

Q. When you took the sandbag off his head, and you said -- well, how do you know he's saying no?
A. Because he shook his head, sir.

Q. Describe for me how his face looks at that time?
A. He looked all right, sir. I can't picture his face that day, it was a long time ago. So I can't picture exactly how he looks or --

Q. Did you -- did he eat anything?
A. I -- he didn't want to eat either, sir, because I would try to give him water and food and he wouldn't.

Q. Well, was it, was that unusual that you would have a guy in isolation for that period of time, or for that length of the time? You're describing over a 12-hour period of isolation. Was that longer than the average prisoners?
A. No, sir. They came, sometimes they came really fast, the HET Team before they -- and sometimes it took a couple of hour. I don't know, like, they were busy doing something else. I really don't know.

Q. Who was on the shift before you?
A. I can't recall, sir.

Q. Okay. All right. Okay. in your statement that you gave on 6 June 2003, that must be the statements you gave to Major Paulus. These state in there, (b)(6) he would not follow any orders, nor would he eat or drink." What did you mean he would not follow any orders?

A. To get up because he would just lay there.

Q. Why were you trying to get him up?

A. Because he had to stand up before the HET Team got there, I guess.

Q. Now, what would you do to try to get him up?

A. Just scream at him and he wouldn't, so I guess we just left him there. So I knew he wasn't going to get up so I was like, okay.

Q. Did you observe anybody strike him or kick him?

A. No, sir.

Q. Anybody on your crew?

A. No, sir.

Q. Did you do that?

A. No, sir.

Q. Um, that was the last---how long did it last?

A. Four hours.

Q. How hot was it there?

A. It was hot, sir.

Q. Did you think it was unusual for that entire four-hour period that you describe, that he was not drinking water?

A. Yes, sir, but he wouldn't drink it.

Q. But did you have any concerns about his health?

A. I thought he was trying to be -- I don't know, like, I don't know if he was trying to make a statement or something, but he looked fine when I took his sandbag off. He looked fine, he just wouldn't want to listen to anything. He didn't want to get up, he didn't want to eat, he wouldn't drink. Everybody else, you know, they were eating and drinking and, you know, he wouldn't want it.

Q. Was he the first prisoner you ever had that refused to eat or drink?

A. No. I think it happened another one.

Q. Tell me about the other one?

A. He just -- at first, he just didn't understand why he was there or whatever, and he wanted to talk to somebody. And then he stopped eating and drinking for a while.

Q. So what ended up happening?

A. He started eating again. I actually told the guy, the linguist, listen, because he spoke English. We called him Heavy D and I told him just for me, you got to -- I don't know what's going on, but you've got to start eating.

Q. So with that individual, you had concerns. Right? So you talked him into eating and drinking?

A. We did that to (b)(6) too, but he wouldn't have --

Q. During your shift, did you a corpsman check him out?

A. They were around.

Q. Did you actually see a corpsman check (b)(6)?

A. They had checked everybody, but I can't tell you right now, I don't remember them checking him.

Q. Okay. From the time that you were there at the detention facility, what was the procedures if you had a prisoner was ill?

A. Take them to the hospital, sir.

Q. How is that decision made?

A. We have to call the OIC, and then they take it higher and they say, yeah, and we take them. We set up a security vehicle and high back for the prisoner to get to the hospital.

Q. Was there a time when you saw a corpsman walk in to a detention facility, grab up a prisoner, and just walk out of the facility without telling anybody?

A. No, sir.

Q. Is it your understanding that that corpsman had that type of power that they could just walk out with a detainee, if they thought they were sick?

A. I never seen it happen, sir. They walk out for no

reason? Just take them like that? No, I don't think that would ever happen. Not on my shift at least.

Q. All right. Now, I use to the work "ill" with you and you said that they would be taken to the hospital. What's your definition of ill?

A. Well, they'll tell. I couldn't understand them. They just tell you, I feel bad because there was a few of them that did it. I guess they tell you, I feel bad, we'll call the doc.

Q. Did you have any diarrhea?

A. (b)(6)

Q. Other than him?

A. I can't recall, sir.

Q. So the people that were -- who said I'm ill, I need to go to the doctor, the go to the doctor. That's what you're saying?

A. A few of them went to the doctor.

Q. How about those that were actually showing physical symptoms such as diarrhea?

A. Well, the only one that I seen was (b)(6).

Q. All right. Okay. So you said that's -- okay. Well, let's talk about that now. You just said the only other time you saw (b)(6) was on the next day and that would be 4 June, roughly around noon when you were on your shift. But now you're talking about when (b)(6) has diarrhea. So tell me how it is that you know that?

A. We was all there. He actually on himself. He defecated on himself.

Q. Did -- were you there when that happened?

A. I was there, I believe it happened almost at the end of my shift sir.

Q. And again, (b)(6) and (b)(6) were on shift with you?

A. Yes, sir.

Q. What did you observe?

A. He was, the smell.

Q. Talk to me about the smell?

A. I mean, sir, I can't describe it. He's defecated on himself, it smells bad.

Q. Did it smell worst than average defecation?
A. I don't know.

Q. All right. So he defecated on himself, when's the first time that you see (b)(6)
A. The first time I've seen him?

Q. When you see him in the state where he's defecated himself?
A. It was right before my shift, sir, so as a matter of fact, I think somebody came and told me, I think he just shitted on himself. We came and checked and I guess, you know.

Q. Okay. Do you recall who told you that?
A. I don't know. He was one of -- either (b)(6) or Lance corporal (b)(6)

Q. When you were told that, what happened?
A. When we called, like, what's going on? What are we going to do.

Q. You called the OIC? The OIC being who?
A. Well, it was Major Paulus at that time.

Q. And so what happened?
A. He came in. I think -- when he came in, it was Lance Corporal (b)(6) and (b)(6) there, and I was in the other one, so I didn't, the other place because it was two, and we --

Q. The holding building?
A. Yes, sir. It was like, those were facing each other. So I guess we took everybody out because we put them over here, everybody together, like the other one. I was sitting here, watching them, so -- doc came and --

Q. Well, what did you observe? Did you observe (b)(6) being removed from that building?
A. I didn't see it, but I know --

Q. Just what you saw? Did you observe or hear Major Paulus giving -- or anybody giving the instruction on how Mr. (b)(6) was supposed to be removed?
A. Negative, sir.

Q. So once you locked the door, you didn't see how that whole -- how he was removed?

A. No, sir, because I was in here, this room, and once you come in the door, we have a little seat right here on the side.

Q. Okay.

A. Or this one on this side, I was sitting down facing this way and --

Q. When you saw (b)(6) did you actually see (b)(6) in the building after he defecated himself?

A. He did it inside the building.

Q. Did you see him?

A. He had already done it, but he was actually still going. When I came over there, it was like a puddle.

Q. Where was the puddle in relation to (b)(6)?

A. Where was the puddle?

Q. In relation to him?

A. On him.

Q. So he's laying in it?

A. Yes, sir.

Q. So it looked like diarrhea?

A. Yes, sir.

Q. Was he laying on his back or his front?

A. He was like this.

Q. On his back?

A. Yes, sir.

Q. Was he making any noise?

A. He wouldn't make any -- the noise of the --

Q. Of the defecation?

A. Yes, sir.

Q. Was he making any noise with his mouth?

A. No, sir. I can't recall.

Q. Was he making any movements at all?

A. No, sir.

Q. When you saw that, what did you think?

CC[MR. HIGGINS]: Objection. Relevance.

Questions by the prosecution:

Q. When you saw that, what did you think?

A. I don't know. Just let's call him to see what's going on with him.

Q. Did he look ill?

A. He looked the same, sir. He looked the same to me. I mean, he didn't look ill, but I think he probably was if you do that to yourself. I mean, I guess.

Q. Did you have diarrhea when you were over there?

A. Yes, sir.

Q. Did you receive any treatment for it?

A. No, sir. It was just a thing that went on that everybody was throwing up and diarrhea --

Q. But did you get any treatment from the corpsman, any medication?

A. I mean, I don't remember. I don't think so. I mean, I didn't take anything for that. I had it a couple of days, two or three days, sir, and it went away.

Q. So when you had for two to three days, during that period of time that you were ill, what did you do?

A. During that period of sometime that you were ill. Go to the head, sir.

Q. Other than going to the head, did you continue to work or --

A. Yes, sir.

Q. So you were on light duty?

A. Yes, sir.

Q. Okay. So that's what you saw with (b)(6) in the building, when was the next time you see (b)(6)

A. I think that was the last time, sir.

Q. Did you see him outside?
A. As soon as I was leaving my shift, yes, sir, because my shift was almost over. As soon as I was leaving, he was already outside, and I left. And that was the last night.

Q. Describe what you saw when you saw him outside.
A. He was just laying because we had a little recreational, they want to come and pray, and they would come outside, and he was just laying there.

Q. Was he clothed or naked?
A. He was naked, sir.

Q. What was he doing?
A. He was just laying there, sir?

Q. On his back?
A. On his back, yes, sir.

Q. Was he making any noises with his mouth?
A. I can't remember hearing it because he was already -- I'm leaving. The next shift is coming. I know I seen him because I remember I seen him outside as I was walking towards my tent.

Q. Okay. So he's laying outside in the sand?
A. Yes, sir.

Q. How hot -- is the sun still up?
A. Yes, sir.

Q. What time of day is this?
A. 1600.

Q. Do you know what the temperature was?
A. No, sir.

Q. Did it seem hot to you?
A. Yes, sir.

Q. Did you have any prisoners there during your time at Whitehorse that had diarrhea?
A. I can't -- I wouldn't.

CC[MR. HIGGINS]: Objection. Asked and answered.

Questions by the prosecution:

Q. Did you?

A. No, sir.

Q. Did you have any prisoners that were left outside naked in the sun other than (b)(6)?

A. No.

Q. What did you think was the significance of (b)(6) as a prisoner when he came into the camp?

A. What do you mean?

Q. Did you know why he was captured?

A. Not at the time when he came in, but I think the next one, somebody had said, I guess from the HET Team, the HET Team told them what was going on. They passed the word and said, hey, this guy or whatever.

Q. Well, did you hit him?

A. I guess he was involved in the ambush of 507th maintenance.

Q. Okay. So is the last time you saw (b)(6) is when you saw him outside?

A. Yes, sir.

Q. And you never saw him again?

A. No, sir.

Q. And I want to shift gears on you, and let's talk about something different. That same day, did you have a

(b)(6) that arrived at the camp?

A. Yes, sir.

Q. And tell me about your involvement with him?

A. There was no involvement. We had to go fix another room for him, put a cot, put a chair, make sure everything was in -- put a little concertina wire, at least in the front.

Q. Was this the same room that (b)(6) had been removed from?

A. No, sir. He was in another room by himself.

Q. Who was guarding it?
A. Some Marines from the COC that came. I know one of friends, he was there and it was his -- him and, I think 5 or 6 other Marines.

Q. Now, at any time, was the (b)(6) removed from that building and placed somewhere else?
A. After a while because he wasn't in that long, sir. He was there, I would say, like, 24 hours maybe, give or take, sir. And right before they took him out of that room, we put him in the other room, and they put him in the room and --

CC[MR. HIGGINS]: Objection. Hearsay.

Questions by the prosecution:

Q. How did you know that?
A. Because the thing is, sir, we I put a letter letting them know because they wanted -- they were coming to get him and I put a letter and stuff like that. So when all the commotion was going on, I seen him, he was already, you know, in this other room there.

Q. Who the guarding him at that time?
A. There was a shift there, I can't recall what shift it was, sir.

Q. Okay. What were you doing during that time?
A. Just getting ready to go to the berm, staff sergeant told us you go here, you go here, you get the roof, you go to the other side because everybody was moving, sir.

Q. How long were you in this status where you were stood up awaiting a potential attack?

A. I'd say about a half hour, sir, half hour to 45 minutes.

Q. Was it still daylight outside when you were stood down?

Q. When you were stood up for the attack, a half hour later you were still down, and it was still daylight?
A. Yes, sir.

Q. Is the sun still up?
A. Yes, sir.

MJ: Yes.

The deposition recessed.

CROSS-EXAMINATION

Questions by the defense (Capt Folk):

Q. Sergeant (b)(6) I want to direct your attention first to the period of time when (b)(6) was getting in-processed into the detention facility. An if any of my questions don't make sense, just let me know and I'll re-ask you.

A. Roger, sir.

Q. Were you present for the entire period of time when (b)(6) got strip searched and formally in-processed into Camp Whitehorse?

A. Yes, sir.

Q. And Lance Corporal (b)(6) was the Marine conducting that strip searching process?

A. Yes, sir.

Q. Was Doc (b)(6) in that area during the strip search process?

A. Yes, sir.

Q. Where was he in relation to (b)(6)?

A. I think it was like (b)(6) myself, and I think Doc (b)(6) was on this side. I'm here, they were there, and (b)(6) here and (b)(6) here.

Q. And solely for the record, Sergeant (b)(6) has indicated that -- well, why don't you do that one more time.

A. (b)(6) was at the right side of (b)(6).

Q. So (b)(6) was facing (b)(6)?

A. Yes, sir.

Q. And Petty Officer (b)(6) would have been to Lance Corporal (b)(6) immediate right?

A. Yes, sir.

Q. And then you were to his left?

A. Yes, sir.

Q. And earlier, I think when you were answering Major Francis' question, you said that Staff Sergeant (b)(6) was kind of behind you?

A. Yes, sir.

Q. From where Staff Sergeant (b)(6) would he have been able to observe what was going on during the strip search?

A. Yes, sir.

Q. At any point during the strip search, that whole period of time when (b)(6) was putting (b)(6) through the process, did you ever see Petty Officer (b)(6) strike (b)(6)?

A. No.

Q. Did you see Petty Officer (b)(6) have any physical contact at all with (b)(6)?

A. No, sir.

Q. How long would you see that the in-processing and strip searching of (b)(6) lasted?

A. Ten to fifteen minutes.

Q. Okay. Now, did you see Lance Corporal (b)(6) have any physical contact with (b)(6) during this in-processing beside the acts of physical contact?

A. No, sir.

Q. Did you see him place his hand on (b)(6) throat area?

A. I can't recall.

Q. You don't remember seeing that?

A. No, sir.

Q. Did you punch (b)(6) or strike (b)(6) with a closed fist?

A. No, sir.

Q. Did you strike him in the ribs?

A. No, sir.

Q. Did you see anybody strike him in the ribs during that in-processing?

A. No, sir.

- Q. Let's talk about this (b)(6) now, when -- where did you first come into contact with this (b)(6) character once he was brought into Camp Whitehorse?
- A. I didn't come into contact with him at all. It's just that I seen him just for like a few minutes. It was just so brief. I know he was there because everybody told me about it, and they had their own guard sitting down in their little hut or little house outside. It was a head before. I guess we cleaned it for him. We put up a cot and chair, and I seen him just -- not even when he was there -- when we were about to go on the alert I know he was in the room already, but that was after -- we didn't see him, I mean, I want to say they said not to have any contact with him because he was special or something, I don't know, high ranking chief or something.
- Q. Did you personally, with your own eyes, see the (b)(6) at all when he was at Camp Whitehorse?
- A. I seen him, yes, sir.
- Q. Where did you see him?
- A. He was already inside the regular -- where everybody else --
- Q. Holding pen?
- A. Yes, sir.
- Q. Okay. When you saw him there, who else, if anyone did you see in there with the (b)(6)
- A. I think (b)(6) was in there. It was just too much commotion going on, we were getting ready to -- the civilians, they were coming to attack us, so I know so I seen him in there because everybody was running around. You go there, you go there, and --
- Q. Did you see any Marines with in there with (b)(6)
- A. I don't think so, sir.
- Q. You don't remember seeing any Marines?
- A. No, sir.

CC[MR. HIGGINS]: (b)(6) or (b)(6)

DC[CAPT FOLK]: I'm sorry. The (b)(6)

Questions by the defense (Capt Folk):

- Q. Did you see if anyone was there with the (b)(6)
A. No, sir.
- Q. Did you see the (b)(6) when he was in-processed and strip searched at Camp Whitehorse?
A. No, sir.
- Q. What were you doing when this kind of chaotic period was going on to get ready for this attack?
A. Well, around there, around our area, which was, like right behind where the prisoners were at, I don't know exactly what I was doing at the moment, sir, but I know I was there because they came and said everybody get ready, and --
- Q. So we would be incorrect to say that you ever spent maybe 20 to 30 minutes with the (b)(6)
A. Yes, sir.
- Q. Were you ever in the holding pen area with the (b)(6) and Sergeant Pittman and Lance Corporal (b)(6)
A. Negative, sir.
- Q. Did you ever strike the (b)(6) physically in any way?
A. Negative, sir.
- Q. When -- I'm going shift gears back to (b)(6) After that strip search of (b)(6) by Lance Corporal (b)(6) when was the next time you personally saw Mr. (b)(6)
A. I'd say the next day.
- Q. And --
A. Because that was at night, the next day.
- Q. Approximately, what time did you see him that day?
A. My shift. I don't know because I think it was from noon to four, but it was about that time frame that my shift was on.
- Q. Did you notice anything about this physical appearance that seemed out of the ordinary?
A. Not -- just that he was laying down, but actually nothing.

Q. Did he appear to be in any pain?
A. No, sir.

Q. Did he appear to be having any difficulty breathing?
A. No. I don't think, sir.

Q. Just want you to speak up so he can hear whether or not you --
A. Yes, sir.

Q. Did he appear to you to be conscious, like the rest of the prisoners?
A. Yes, sir.

Q. Were you ever told at the chain -- was it your experience to come on duty at Camp Whitehorse that the off-going guards would give you a brief on what was going on, if there was anything out of the ordinary?
A. Yes, did that if any. I didn't think there was no --

Q. You would pass the word?
A. Yes, sir.

Q. Did anybody ever pass the word to you when you were coming on shift that (b)(6) was being belligerent?
A. No, sir.

Q. Did you ever receive any brief when you were coming on duty that dealt with (b)(6)?
A. No, sir.

Q. And you were standing post at that time, you said, with Corporal (b)(6) and then --
A. No, sir. At that time, it was Lance Corporal (b)(6) and Lance Corporal (b)(6) sir.

Q. Okay. Did you know Sergeant (b)(6)?
A. He ---I didn't know him, but he was there. He was there for about 3 or 4 days, about a week tops. It was something brief.

Q. Do you recall seeing him at all on that day that it was all the chaos going on with the (b)(6)?
A. No, sir.

CC[MR. HIGGINS]: See who?

DC (CAPT JASPER) [CAPT FOLK]: See Sergeant (b)(6)

Questions by the defense (Capt Folk):

Q. Now, going backwards in time here a little bit. Going back to (b)(6). Did you see him get off-loaded -- get unloaded for that matter from the HMMWV's that dropped him off?

A. What do you mean?

Q. Did you see (b)(6) get removed from the HMMWV's?

A. Yes, sir.

Q. How -- did you personally --

A. It was Pittman and I.

Q. Describe how (b)(6) was removed from the HMMWV?

A. He was in the seven ton, I think it was, and his head was toward us, like, I mean he came around. Pittman came to this side, I came to this side, and we grabbed -- can I show you.

Q. Yes. Will you demonstrate (b)(6)?

A. It's like, his arm. He's like this, so we grabbed this arm. He grabbed the other hand. We pulled him and he came down, and that's it. Then, we just walked him to the pen, sir.

DC [CAPT FOLK]: Okay. Sergeant (b)(6) demonstrated how they he removed (b)(6) by making an L with his arm, simulating his arm being under (b)(6).

WIT: Check, sir.

Questions by the defense (Capt Folk):

Q. Did you remove any other prisoners besides (b)(6) on that particular --

A. No, sir.

Q. Did you see the any other prisoners get removed from the HMMWV's on that evening?

A. No, sir.

Q. Was there any lighting in that area where (b)(6) and the rest of detainees were unloaded besides the light that was being provided by the HMMWV headlights?

A. No, sir.

DC[CAPT FOLK]: Sergeant, I have don't have any other questions for you. Thank you.

DC[CAPT JASPER]: We have no questions.

MJ: Nothing further?

TC: No, sir.

CC[MR. HIGGINS]: Has he been given orders?

TC: He's on active duty, so I can't subpoena him.

MJ: Sergeant, I want to thank you for your attendance and testimony here today. Please don't discuss your testimony with anyone other than government counsel or defense counsel. You're free to return to your normal duties.

WIT: Can I say something for the record?

MJ: If you want to say something, let's just go ahead and go off the record.

The deposition adjourned.

AUTHENTICATION OF DEPOSITION

in the case of

Major C. A. Paulus and Sergeant G. P. Pittman, U.S.
Marine Corps, 2d Battalion, 25th Marines, Reserve Unit, Garden
Grove, New York.

Pursuant to R.C.M. 1104(a)(2)(B), the deposition in the foregoing
case is authenticated by the trial counsel due to the deposition
officer's return to reserve status.

L. J. FRANCIS
Major, U.S. Marine Corps Reserve
Trial Counsel



UNITED STATES MARINE CORPS
MARINE CORPS BASE
BOX 555010
CAMP PENDLETON, CALIFORNIA 92055-5010

IN REPLY REFER TO:
5800
SJA
14 MAY 2004

From: Commander
To: Colonel D. L. Applegate (b)(6) USMCR

Subj: ORDER FOR ORAL DEPOSITIONS ICO UNITED STATES V. MAJOR CLARKE A. PAULUS
(b)(6) USMC AND UNITED STATES V. SERGEANT GARY P. PITTMAN
USMCR

Ref: (a) RCM 702, MCM (2002 Ed.)

1. Per the reference, you are hereby appointed as the deposition officer in the subject cases. The Marines to be deposed are as follows:

- a. Staff Sergeant (b)(6) USMCR attached to 2d Battalion, 25th Marines, (b)(6) ;
- b. Sergeant (b)(6)
(b)(6)
- c. Corporal (b)(6)
(b)(6)
- d. Lance Corporal (b)(6)
(b)(6)
- e. Lance Corporal (b)(6) USMCR attached to 2d Battalion, 25th Marines, (b)(6)
- f. Lance Corporal (b)(6)
(b)(6)
- g. Lance Corporal (b)(6) USMCR attached to 2d Battalion, 25th Marines, (b)(6) ;
- h. Lance Corporal (b)(6) USMCR attached to 2d Battalion, 25th Marines, (b)(6)
- i. Lance Corporal (b)(6) USMCR attached to 2d Battalion, 25th Marines, (b)(6)
- j. Lance Corporal (b)(6) USMCR attached to 2d Battalion, 25th Marines, (b)(6)
- k. Lance Corporal (b)(6) USMCR attached to 2d Battalion, 25th Marines, (b)(6)
and,

2000 EXHIBIT 1
(PROSECUTION) XXIV
APPELLATE UNIT
PAGE 37 OF 43

Subj: ORDER FOR ORAL DEPOSITIONS ICO UNITED STATES V. MAJOR CLARKE A. PAULUS
(b)(6) USMC AND UNITED STATES V. SERGEANT GARY P. PITTMAN
(b)(6) USMCR

1. Lance Corporal (b)(6) USMCR attached to 2d Battalion, 25th Marines, (b)(6)
2. This action is necessary because these Marines may become material witnesses in the subject cases and their testimony preserved should it become necessary. These depositions should be completed no later than 10 June 2004. If additional time is necessary, submit a written request for an extension. The depositions will be recorded by a court reporter for further use in court-martial proceedings.
3. By copy hereof, trial and defense counsel currently detailed in the subject cases will remain detailed for the oral depositions.

M. L. Hampton
M. L. HAMPTON

Copy to:
TC (Maj Francis)
DC (Capt Jasper/Capt Folk)
SJA, 1stMarDiv (Rear)



UNITED STATES MARINE CORPS
MARINE CORPS BASE
BOX 555010
CAMP PENDLETON, CALIFORNIA 92055-5010

IN REPLY REFER TO:
5800
SJA

11 MAY 2004

From: Commanding General
To: Colonel D. L. Applegate (b)(6) USMCR

Subj: ORDER FOR ORAL DEPOSITIONS ICO UNITED STATES V. MAJOR CLARKE A. PAULUS
(b)(6) USMC AND UNITED STATES V. SERGEANT GARY P. PITTMAN
USMCR

Ref: (a) RCM 702, MCM (2002 Ed.)

1. Per the reference, you are hereby appointed as the deposition officer in the subject cases. The Marines to be deposed are as follows:

- a. Major (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- b. Sergeant (b)(6) USMCR residing at (b)(6)
(b)(6)
- c. Sergeant (b)(6) USMCR attached to
2d Battalion, 25th Marines, (b)(6)
- d. Hospitalman Second-Class (b)(6) USNR residing at
(b)(6)
- e. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- f. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- g. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- h. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- i. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- j. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)

2. This action is necessary because these Marines and one Sailor may become material witnesses in the subject cases and their testimony preserved should it become necessary. These depositions should be completed no later than 10

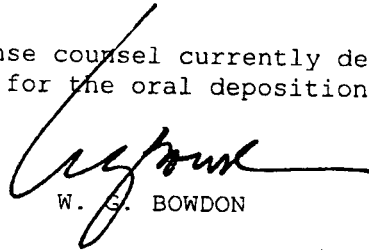
APPELLATE DUTY

XXIV DEPO EXHIBIT 2 (PERRA)
39 OF 43 PROSECUTION, 6 (PERRA)

Subj: ORDER FOR ORAL DEPOSITIONS ICO UNITED STATES V. MAJOR CLARKE A. PAULUS
(b)(6) USMC AND UNITED STATES V. SERGEANT GARY P. PITTMAN
USMCR

June 2004. If additional time is necessary, submit a written request for an extension. The depositions will be recorded by a court reporter for further use in court-martial proceedings.

3. By copy hereof, trial and defense counsel currently detailed in the subject cases will remain detailed for the oral depositions.



W. G. BOWDON

Copy to:
TC (Maj Francis)
DC (Capt Jasper/Capt Folk)
SJA, 1stMarDiv (Rear)

AE XXIV pgs 41-43 Removed under (b)(6)

DO: The time is 1106 on the third of June 2004. Before we proceed, and let me just set off with Major Pittman on the --

CC[MR. HIGGINS]: Major Paulus.

DO: Excuse me. I apologize. Major Paulus on the reading of the rights and administrative issues.

Is Major Paulus ready to proceed?

CC[MR. HIGGINS]: He is.

TC: Commanding General, Marine Corps Base, Camp Pendleton, has directed this deposition by the Appointing Orders, dated 11 May 2004.

The following persons are present: Colonel Applegate, as DEPOSITION OFFICER;
Major Francis, as GOVERNMENT COUNSEL;
Captain Folk, as DETAILED DEFENSE COUNSEL for Pittman,
Captain Jasper, as DETAILED DEFENSE COUNSEL for
Major Paulus;
Mr. Higgins, as CIVILIAN DEFENSE COUNSEL for
Major Paulus; and.
Sergeant Pittman and Major Paulus are both present, the two accuseds in the case.

Sergeant Johnson is the court reporter and he has been previously sworn.

I'm a judge advocate certified and sworn under Article 27(b) and 42(a). I have not acted in any manner which might tend to disqualify me from this deposition. And I'm ready to proceed at this time.

The accuser for the charges is Lance Corporal Prokuski, and the charge sheets have been previously given to both defense counsel.

The Appointing Orders are right here to review by the defense counsel, and provided to the defense counsel after this proceeding.

DO: Thank you. And with respect to Sergeant Pittman, is the sergeant ready to proceed Captain Folk?

DC[CAPT FOLK]: Yes, sir.

DO: Would defense counsel please describe qualifications, status as to oath and readiness to proceed.

DC[CAPT JASPER]: Yes, sir. My name is Captain Jasper. I'm qualified and certified in accordance with 27(b), and sworn under with 42(a) of the Uniform Code of Military Justice. I've been detailed to this court-martial by myself, in capacity as Senior Defense Counsel, Legal Services Support Team Delta. I have not acted in any disqualifying manner, and we are ready to proceed.

DO: Okay. And would civilian defense counsel do the same.

CC[MR. HIGGINS]: Yes. I'm a member of the bar of the State of California and the Commonwealth of Massachusetts. I'm also a reserve officer in the JAG Corps, United States Navy. I'm qualified and certified under 27(b), and I've also been previously sworn in this court-martial to represent as civilian counsel. My business address is 46 Wachusett, Worcester, Massachusetts 01609.

DO: And Captain Folk, could you do the same.

DC[CAPT FOLK]: Yes, sir. I'm a judge advocate qualified, certified, and sworn in accordance with Articles 27(b) and 42(a) of the UCMJ, I have not acted in any disqualifying manner in this court-martial, and I was detailed to represent Sergeant Pittman by the Senior Defense Counsel for Legal Services Support Team Echo.

DO: Thank you. I am not an accuser, and I have not acted in any disqualifying capacity. I am a judge advocate certified and sworn for Articles 27(b) and 42(a).

I am a field grade officer in the United States Marine Corps Reserve. My training includes members of -- in the bars of California, Arizona, Texas Commonwealth of Virginia, and Maryland. I am neutral, detached, impartial, and fair.

Does any party wish to voir dire me at this time?

A negative response from all counsel.

DO: Major Paulus, the purpose of this deposition is to take and preserve the testimony of a witness for the use of

trial or investigation. By "preserve," I mean that we will take the testimony, put it in a form in which it might be used at trial by court-martial. This deposition may also serve as a discovery device and allow the parties to learn strengths and weaknesses of their cases.

Do you understand what I just told you?

ACC[MAJ PAULUS]: Yes, sir.

DO: Thank you. Do you have in problems or disabilities in reading, writing, understanding, and speaking the English language?

ACC[MAJ PAULUS]: No, sir.

DO: Um, and I assume that if you would choose to do so at this time, to look at R.C.M. 702 in your counsel's Manual for Courts-Martial as I advise you of your rights.

You also have the following rights: To be present at this deposition except when you, without good cause fail to appear after notice of this deposition, you are disruptive, or the deposition is ordered instead of production of the witness on sentencing and the convening authority determines that the interest of the parties and the court-martial can be adequately served by the oral deposition without your presence. And you also you have the right to be present and represented by counsel.

Do you understand these rights?

ACC[MAJ PAULUS]: Yes, sir.

DO: And once again, if you choose to do so, please look at R.C.M. 506 in your counsel's Manual for Courts-Martial as I advise you of your rights to counsel.

You have the right to be represented by civilian counsel at no expense to the government. That means, you or someone acting for you would have to retain a civilian lawyer if you wanted one. You have the right to be represented by Captain Jasper, your detailed defense counsel. You also have the right to be represented by another military counsel of your own selection if that counsel is reasonably available.

Military counsel of your own selection are provided to you free of charge.

Do you understand these rights?

ACC[MAJ PAULUS]: I do, sir.

DO: Do you have any questions about your rights?

ACC[MAJ PAULUS]: No, sir.

DO: Do you wish that Captain Jasper continue to represent you?

ACC[MAJ PAULUS]: I do, sir.

DO: And you also wish to have Mr. Higgins represent as well?

ACC[MAJ PAULUS]: I do, sir.

DO: All right. Now, Sergeant Pittman, I want to go over the same issues with you as well, although we've done so previously in the deposition of Lance Corporal

(b)(6)

The purpose of this deposition is to take and preserve the testimony of a witness for use at trial or investigation. By, "preserve," I mean, that we will take the testimony and put it in a form at which it might be used at trial by court-martial. This deposition may also serve as a discovery device, and allow the parties to learn the strengths and weaknesses of their cases.

Do you understand what I just told you.

ACC[SGT PITTMAN]: Yes, sir.

DO: Do you have any problems or disabilities in reading, writing, understanding, and speaking the English language.

ACC[SGT PITTMAN]: No, sir.

DO: And once again, as I informed the major, please look along if you so choose at R.C.M. 702 in your counsel's Manual for Courts-Martial as I advise you of your rights.

You also have the following rights: To be present except when you without cause, except you, without good cause, fail to appear after notice of this deposition, you're disruptive, or the deposition is ordered instead of production of a witness on sentencing and the convening authority determines that the interests of the parties in the court-martial can be adequately served by an oral deposition without your presence, and you also have the right to be represented by counsel.

Do you understand these rights?

ACC[SGT PITTMAN]: Yes, sir.

DO: Once again, if you so choose, look at R.C.M. 506 in your counsel's Manual for Courts-Martial while I advise you of your rights to counsel.

You have the right to be represented by civilian counsel at no expense to the government. That means, you or someone acting for you would have to retain a civilian lawyer if you wanted one. You also have the right to be represented by Captain Folk, your detailed defense counsel. You also have the right to be represented by another military counsel of your own selection, if that counsel is reasonably available. Military counsel of, including counsel of your own selection are provided to you free of charge.

Do you understand these rights?

ACC[SGT PITTMAN]: Yes, sir.

DO: Do you have any questions about your rights?

ACC[SGT PITTMAN]: No, sir.

DO: Do you want Captain Folk to continue to represent you?

ACC[SGT PITTMAN]: Yes, sir.

DO: And you also have civilian detailed defense?

ACC[SGT PITTMAN]: Yes, sir.

DO: And you also have civilian detailed defense counsel.

ACC: Yes, sir.

DO: Captain, would you put on the previous understanding of his civilian counsel.

DC[CAPT FOLK]: Yes, sir. John Trainberg [ph], he is a civilian Bar Certified California attorney, who is also representing Sergeant Pittman as a retained civilian lawyer. He's aware of the depositions, and he's waived his presence. Sergeant Pittman consents to that.

Mr. Trainburg obviously also agrees with that, and we'll go forward.

DO: Thank you. Has Captain Folk adequately stated or accurately stated your understanding of your agreement with your civilian counsel's absence here today.

ACC[SGT PITTMAN]: Yes, sir.

DO: Let me go over some of the ground rules for the deposition. One of my duties here is to maintain order and protect the parties and the witnesses from embarrassment or oppression. I will record but not rule upon objections and motions. A failure to object to the taking of a deposition on grounds which may be corrected if the deposition is made prior to the deposition lay such an objection.

Objections to questions or testimony. Or evidence at an oral deposition and the grounds for such objection should be stated at the time of taking of such said deposition. If an objection relates to a matter which could have been corrected, if the objection had been made during the deposition, the objection is waived if not made at the deposition. The scope and the manner of examination will be the same as if it was a trial by court-martial. The government must provide the accused with any statements of the witnesses in the possession of the government. Any objections to this should be stated on the record at this time before we proceed.

A negative response from all counsel.

DO: All right. The government may proceed.

TC: Just go ahead and keep your seat, but I need to swear you in. If I could get you raise your right hand.

(b)(6) a civilian, was called as a witness by the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name?

A. (b)(6)

Q. Spell your last name, please?

A. (b)(6)

Q. So it's (b)(6)

A. Yes.

Q. Now, you were formally a sergeant in the United States Marine Corps. Correct?

A. Correct, sir.

Q. Were you in the reserves or on active duty?

A. I was on active duty from May 6, 1996 to May 5, 2002. I was release from active duty and recalled on March 3, 2003.

Q. Okay. And --

A. I was medically retired on December 31st of 2003.

Q. Can you please just give us your home address?

A. (b)(6)

Q. All right. You stated that you -- that you're medically retired. If you could just tell us why it was you were medically retired?

A. Medically required for a brain tumor discovered at the Naval hospital in July 21st of 2003.

Q. What's your current status regarding that?

A. About the same as it was then.

Q. Again, ongoing treatment for that?

A. Yes, sir.

Q. From talking with your wife before, you have difficulty traveling; is that correct?

A. Correct, sir.

Q. If you could please describe what difficulties you have when you travel?

A. I can drive okay, but if I fly, the last time I flew I had a what's been described as a seizure. When I went to get off the airplane, I couldn't walk off the plane. They had to bring the wheelchair on to the plane to bring me off. I was nauseated, throwing up in the hospital later on.

Q. So you had to be admitted into the hospital from your condition from that?

A. Yes, sir.

Q. All right. Let's talk about driving. It's quite a long ways from Houston Texas to Camp Pendleton California. Did your condition prohibit driving like a thousand miles?

A. No, sir.

Q. Say again?

A. No, sir.

Q. The reason I ask that is because obviously with your condition, you have to determine whether you -- at a later time, a judge is going to have to determine whether you're available or not to appear meaning he subpoenaed you to appear in California whether to use your deposition testimony or other type of use of your testimony. So is there any prohibit -- anything that you have in you medical condition that could, that would prohibit you from traveling --

CC[MR. HIGGINS]: Major Francis, may I interrupt for a second?

TC: Yes.

CC[MR. HIGGINS]: We'll stipulate to those grounds and save you the time of going through that.

TC: Thanks.

Questions by the prosecution:

Q. Like I was talking before, if there was ever a challenge

on your availability for trial, then a judge would have to determine whether you're available or not based on your medical condition, and what the defense is doing, at least Mr. Higgins is stipulating that your medical condition would be such that you would be unavailable.

Captain Folk, how about you?

DC[CAPT FOLK]: I would agree at this time that he's unable to travel via airplane. Now, obviously I would leave him to his individual situation at the time of the trial. I'd absolutely stipulate that at this point he's completely unable to fly due to his medical condition.

TC: All right.

CC[MR. HIGGINS]: If I may, in a nutshell, you may not have to come out to the trial in California. That's all we were talking about. All the legales. Okay?

WIT: Okay. I'll continue to ask, sir. I need to know what's going on too.

TC: No. Any questions you have, certainly bring those up and we'll try to address those for you. Okay?

Questions by the prosecution:

Q. Highest rank you received was sergeant. Correct?
A. Yes, sir.

Q. What was your MOS?
A. (b)(6)

Q. Did you have to go to some school for that. Right?
A. (b)(6)

Q. How are you selected for that?
A. (b)(6)

Q. (b)(6)
A. No.

Q. Let's talk about your schooling that you received. What exactly were you taught?
A. (b)(6)

Q. Okay. By the time -- how long did this school last?
A. About a year and a half, sir.

Q. (b)(6)
A. (b)(6)

Q. What's the scale?
A. One to five, and they only test you until a 3 proficiency level.

Q. All right. So at some point, you deployed in support Operation Iraqi Freedom. Correct?
A. Yes, sir.

Q. You had to be called up on active duty for that, or were you already on active duty?
A. I had to be called up for that, sir.

Q. And when were you called up?
A. My reporting date was March 3, 2003.

Q. All right. Which unit were you attached to at that time?
A. I was called up to Reserve Support Unit Mobilization Support Battalion, Camp Pendleton, California.

Q. Okay. Did you deploy with that unit, or which unit did you deploy with?
A. I deployed with I MEF.

Q. Who was your OIC at that time?
A. I don't know, sir. We didn't see any officers.

Q. How about staff staff NCOIC?
A. I think the closest would have been Master Sergeant (b)(6) at I MEF, G-2.

Q. Do you know how he spelled his last name?
A. (b)(6)

Q. Okay. Did he deploy with you?
A. No.

Q. Who was in charge of you when you deployed?
A. Sergeant (b)(6)

Q. Sergeant (b)(6)
A. For the transportation part, then we reported to G-2, I MEF forward at Camp Commando Kuwait.

Q. Okay. Who is -- was it still Sergeant (b)(6) who was your direct superior at that time, when you got actually in country?
A. It was kind of confusing and none of us really knew. We just knew when we got told to go.

Q. What job did you hold when you got over there?
A. We're just get ready to send us up to Iraq, and general linguist.

Q. So whenever a linguist is needed, you're called and used in that capacity?
A. They set us up with the -- most of us went to the HET Teams, Human Exploitation Teams.

Q. Okay. All right. Let's fast forward. Did you have any interaction with Camp Whitehorse Detention Facility?
A. Yes, sir.

Q. How so?
A. I was asked for as an interpreter or translator at that facility by Major Paulus, as he was planning to take over the camp from Major (b)(6)

Q. Do you recall when that was?
A. June 3rd or 4th of 2003.

Q. Okay. Did -- how did you receive that word?
A. I was told by Gunnery Sergeant (b)(6), I believe, that they wanted me. And also by Chief Warrant Officer -- I don't remember his name. But he was the OIC of the HET Team currently there.

Q. Were you asked for by name or just someone to act as a linguist?

A. I do not know how that was. I think by name because I think the original request came through the battalion S-2 officer.

Q. Did you know Major Paulus prior to this?

A. No, sir.

Q. Did you know Major (b)(6)?

A. I think I'd met him once or twice.

Q. How about Major (b)(6)?

A. Again, I met him once or twice.

Q. Were you billeted at Camp Whitehorse?

A. At the time, no.

Q. Where were you billeted at the time?

A. Combat Operations Center in the university -- in the Nasariyah Museum.

Q. All right. So let's go forward to talk about June 3rd or 4th, when you arrived at the actual detention facility. What -- tell us what happened when you got there?

A. I just -- the first day I was just out there being an interpreter because they weren't sure if I was going to be out there full time or not, so I would say probably from 0800 to about 16, 1700, and then went to return to COC that evening.

Q. Okay. When you first arrived, did you go directly to the detention facility when you arrived at Camp Whitehorse?

A. Yes, I did.

Q. Did you report to anybody?

A. No, I did not.

Q. Did you talk to anybody when you got there?

A. I talked to Staff Sergeant (b)(6) because he was the staff NCOIC.

Q. Now, at that time, when you went to the detention facility, what were your observations?

A. Just kind of like everything else in Iraq, dusty, dirty, shot up a little bit.

Q. How about the interaction between the Marines and the detainees?
A. The Marines seemed to have things pretty well handled.
Q. Were you there when any detainees arrived?
A. Yes.
Q. Were you there when (b)(6) arrived?
A. No.
Q. All right. So you said late that day, you went to the COC, did you come back to the detention facility at all that day?
A. No, sir.
Q. When was the next time you recorded there?
A. About 1000 the next day. At that point, it had been decided that I was going to be billeted at the detention center, so I had packed up all my gear and move it over there.
Q. When you went back over there, did you report to anybody?
A. Just back to Staff Sergeant (b)(6).
Q. All right. Now, during that time on that day, did you have an opportunity to observe the interaction with the Marines and the detainees?
A. Yes, sir.
Q. Did you see (b)(6) on that day?
A. I believe so, that was the day, sir.

DC[CAPT FOLK]: Can we clarify what day we're talking about here. You keep saying that day, what day are you referring to?

Questions by the prosecution:

Q. When you say "that day", what day are you referring to.
A. I think it was the fifth 5th of June. I didn't keep dates very -- one day led into another, and it didn't matter out there. You're just kind of in the desert, and one day looks like the next.
Q. Okay. You think it's 5 June that's we're talking about now?
A. Yes, sir.

Q. Now, what were your observations of (b)(6)
A. First thing I remember about him is he was outside laying in the yard, and so I came and watched him, and it would -- it was very difficult to tell what he was up to, but I kept thinking he was trying to engage us because he would lay there and keep his s closed, and when I would take my eyes off of him, I could tell he was looking around. I know you can't tell always, but he was looking like he was looking around intelligently, and as soon as I would look at him, he'd snap his eyes shut like he was trying to hide what he was doing.

Q. You said he was laying in the yard. That was in one of the outside holding pens?

A. Yes, sir.

Q. Let me show you a couple photos. First one is Depo Exhibit 3, do you recognize that individual?

DC[CAPT FOLK]: I'm going to make the same objection I made during the last deposition to both photos being proffered by the government.

DO: You might want to state this one on the record.

DC[CAPT FOLK]: I stated it on the last one, sir. Objecting to the admission of these two photographs. I don't know what their numbers are, but they're two photographs that depict a body.

DO: Go ahead.

WIT: That looks like him.

Questions by the prosecution:

Q. Like (b)(6)

A. Yes, sir.

Q. Let me show you Deposition Exhibit 4. Do you recognize that individual?

A. This again looks like (b)(6)

Q. Now, on both photographs, is that a fair and accurately depiction of how he looked as of the dates that you saw him?

A. No, it's not.

Q. Well, how isn't it?

A. He didn't have any bruising in the face, on the days that I saw him. I don't remember below the neck, but he had no bruising on the face.

Q. Okay. So other than the bruising, anything else?

A. [Witness shakes his head.]

Q. Again, can I get an audible answer for that question?

A. Absent the bruising on his face, I don't know that there was any difference.

Q. So absent the bruising, would you say that's a fair and accurate depiction of the way he looked at the time that you saw him?

A. Yes, sir.

Q. All right. At the time that you saw him, that very first time --

CC[MR. HIGGINS]: I had a previous agreement. What we're going to with the photos is attach black and white copies and provide them to defense counsel.

CC[Mr. Hennigan's Attorney]: I have no objection at all.

DC[CAPT FOLK]: And just so I'm clear, I'm objecting under 403 foundation of those photos.

DO: Noted.

Questions by the prosecution:

Q. What time of the day was this?

A. About 0930, 1000.

Q. Okay. When he was laying there, you said this was the outside holding pen?

A. Yes, sir.

Q. Was he clothed at the time?

A. Yes, sir.

Q. All right. Now, you described what he was doing with his eyes, but how was he laying?

A. On his side, sir.

Q. Any other observations that you had of him at that time?
A. No, sir. Just to the point where he was asking for water, so I got him water.

Q. How did he ask you for water?
A. He just asked in Arabic, so I got him some water. We had 5-gallon water jugs and took the bottle and asked another guard to fill it so we can have somebody keep an eye on him.

Q. Did you observe (b)(6) drink the water?
A. Yes, sir.

Q. How much did he drink?
A. About 2-quarts.

Q. Okay. Did he sit up to drink it?
A. I don't remember, sir.

Q. When he asked you for water in Arabic, describe the tone of his voice?
A. Just kind of a begging tone, I guess. In a interrogative tone. Just, water, water.

Q. Was it loud? Was it medium?
A. It was quiet.

Q. Quiet. Any other observations of him at this time that you made? I mean, how did his demeanor appear?
A. What exactly do you mean, sir.

Q. Was he favoring any part of his body did it appear? What I say demeanor, I mean, he's laying there drinking water, but did it appear he was having any difficulty at all?
A. No, sir.

Q. All right. So he's given water at that time, what happens after that?
A. Then the next thing he does is asks to go back into the room, and so I --

Q. He asked to go back into a room?
A. Back in the cell.

Q. Okay.
A. And I told him had to wait until the other prisoners had finished cleaning it, and once they finished cleaning it, we could return him to the room.

Q. Okay. How was he returned to the room?
A. We helped him up, lance corporal, I don't remember his name, we helped him up and then he walked back into.

Q. Is that lance Corporal (b)(6) [REDACTED]
A. Yes, sir.

Q. So you and (b)(6) [REDACTED] helped him up, how did you help him up?
A. I was trying to help him from under his back.

Q. What was hearing doing?
A. I think he was pulling him by his arm.

Q. Okay.
A. I don't remember exactly, but I know it took both of us to help him up.

Q. Why were you helping him up?
A. Because he wasn't getting up on his own.

Q. Did you have any impressions as to why he wasn't getting up on his own?
A. My impression was he was just trying to make life as difficult for us as he could.

Q. Now, when you helped him up, what happened next?
A. He walked into the holding area, and he was in the back part of it.

Q. Did you walk with him?
A. I don't remember if I walked side by side or behind him. I think behind him, sir.

Q. Did anybody keep their hands on him?
A. No, sir.

Q. So he walks into one of the holding cells in the building?
A. Yes, sir.

Q. And then what happens when he gets in there?
A. He gets to the back area and just kind of lets himself fall.

Q. What do you mean by that?
A. It looked like he let himself go, and he just went to the floor.

Q. On his back? Side? Front?
A. Don't remember, sir.

Q. Did it seem like he fell hard or --
A. No, sir.

Q. Okay.

DC[CAPT FOLK]: I didn't catch that last answer. Can you just repeat that?

WIT: No, sir.

DC[CAPT FOLK]: He didn't appear to fall hard?

WIT: No, sir, he did not.

Questions by the prosecution:

Q. Did he put his arms down for the impact, do you recall?
A. No, I don't, sir.

Q. I know in your statement you mentioned that, you used the word "flopped," do you recall that?
A. Yeah. I recall that flopping, sir. Like I said flop on the floor, so --

Q. When you used the word "flop" what did you mean?
A. Just kind of went to the floor limp-like.

Q. All right. So he goes to the floor limply, what happens next?
A. I leave at that point, and he's secured in his holding cell, sir.

Q. Okay. Now, at some point, did you ever ask him any questions about his health and his age or anything like that?
A. I believe I asked him about his age at one point, and got an answer of 52 from him.

Q. Did he answer in Arabic?
A. Yes, sir.

Q. In all your conversations with him, was that all responding in Arabic?
A. Yes, sir.

Q. Well, let's talk about when he told you he was 52. When did that happen?
A. When he was outside in the holding pen.

Q. Was this before you moved him inside?
A. Yes, sir.

Q. Why was it that you asked him that question?
A. I was directed to by Staff Sergeant (b)(6).

Q. Did Staff Sergeant (b)(6) say why he wanted you to ask that question?
A. No, he did not.

Q. Okay. Did you make any inquiry why you would need to ask someone what their age was?
A. I just figured it was general establishing, it's asking name and stuff, you just needed to know how old people are and everything.

Q. Okay. Now, at the time that you saw (b)(6) flop down, as you described, what was your opinion of his physical condition at the time?
A. I thought he was in pretty good physical condition. Just choosing not to act like it.

Q. All right. So from that time forward, when was the next time you saw him?
A. Approximately 1530, 1600.

Q. Same day?
A. Same day, sir.

Q. What happened when you observed him?
A. I was called back because he had defecated on himself. He had diarrhea, and you could smell it half-way down the other building. It was bad.

Q. Okay. When you say half-way down the other building, how far are we talking?
A. It was 15, 20 feet.

Q. What was the temperature outside at this time, do you recall?
A. No, sir.

Q. Was it hot?
A. Yes, sir.

Q. Say again?
A. Yes, sir.

Q. Okay. So what did you observe?
A. Him laying on the floor in a pool of his own feces. Very liquid, very pungent odor.

Q. Did it appear to be diarrhea?
A. Yes, sir.

Q. Was he still clothed at the time?
A. Yes, he was.

Q. You walk in and you see that, what happens next?
A. Next, some of the other Marines come in and remove the clothes.

Q. Do you recall who these Marines were?
A. I know it was in my statement, bu, no, I don't remember. I think Lance Corporal (b)(6) and a couple of others.

Q. Okay. Then what did you observe?
A. They had to tear his clothes off because there was no hope of getting him cleaned out there.

Q. Okay. Did you see anybody else there other than (b)(6)?
A. There was somebody with him and Staff Sergeant (b)(6) was in the room.

Q. Any officers there?
A. Not that I remember seeing, sir.

Q. All right. His cloth are removed, what's the next thing you observed?
A. Lance Corporal (b)(6) dragging him out to the exercise yard.

Q. How did that occur?
A. I think -- I'm pretty sure he was told to take him out. I'm now sure the exact words that were used.

Q. Who?
A. I'm not sure exactly who.

Q. Okay.
A. So he dragged him out kind of an "S" shape around the concertina wire, and out the door to the corner, and then there was a drop off, probably about the brace on the chair, 12 to 18 inches, into the middle of the exercise yard.

Q. Did you observe the entire dragging?
A. Yes, sir.

Q. How far would you say it was? Taking into account the "S" turns and all that?
A. Probably 10 to 12 yards, sir.

Q. Okay. Was (b)(6) naked at this time?
A. Yes, sir.

Q. How did the dragging occur specifically? Where was he being gripped at on his body?
A. Around his head.

Q. How?
A. An arm under the chin, kind of pressing the chain upright up in here, and Lance Corporal (b)(6) was in their, kind of crouching and pulling him backwards.

Q. So with the forearm, left forearm?
A. I don't remember which arm.

Q. You just know that it was like this?
A. I don't remember which arm it was.

Q. So you have one hand behind the head, and a forearm under the chin?
A. High up.

Q. So right on the top of the chin, right underneath?
A. Yes, sir.

Q. What was hearing doing -- do you recall who was doing that? Who was doing dragging him by the head?
A. I was told who it was by the NCIS officers.

Q. But you don't recall?
A. I knew who it was, one of two people, but I know them

well enough to differentiate.

Q. And the two people being?

A. Lance Corporal (b)(6) or Lance Corporal (b)(6)

Q. All right. Lance Corporal (b)(6), do you recall what he was doing at this time?

A. He was watching the prisoners at the --

CC[MR. HIGGINS]: I want to make sure it's the independent memory. He didn't know who he was, didn't know but he was told that from NCIS. I have that objection.

Questions by the prosecution:

Q. Just for clarity's sake, as you sit there and as you based on your recollection, no one telling you who was doing the dragging, you can't say who it was. Right?

A. Yes, sir.

Q. One of two people?

A. Correct.

Q. I just want to clear that up. Okay. So coming back to my question where we left off at, Lance Corporal (b)(6), what do you recall him doing?

A. I don't, sir. Actually. I was following the person who was dragging (b)(6) out to the yard, and watching him in the yard, while they went to get other prisoners to clean up.

Q. Okay. Describe the defecation on (b)(6) during the trapping incident. Meaning, where was it on his body?

A. All over from about his naval down.

Q. Okay. What would you estimate was (b)(6) weight from what you observed?

A. Around 200, 210.

Q. During the actual dragging episode, what was -- what were his legs doing?

A. I don't remember, sir.

Q. How were his arms?

A. I don't think he was doing anything with his arms.

Q. I'm saying, were his arms at his side?

A. I believe they were at his side, sir.

Q. Do you recall whether he was trying to raise it because Lance Corporal (b)(6) was dragging his hand at all?
A. I don't recall that, sir.

Q. Did it appear that (b)(6) was providing any assistance?
A. No, sir.

Q. When you say, no, what do you mean?
A. He did not appear to be providing any assistance to anyone.

Q. Was it dead weight?
A. It looked like it was, sir.

Q. Okay. Was (b)(6) making any noises or saying anything the whole dragging incident?
A. Not that I remember, sir.

Q. Okay. What was your impression of (b)(6) condition at that time, during the dragging incident?
A. He might have just -- still playing with us, trying to, but he just had diarrhea. So it was hard to do anything at this point.

Q. Okay. What do you mean by that?
A. Having diarrhea really wears your body out, sir.

Q. Okay. Did you think he was sick at all?
A. I didn't know, sir.

Q. Did you have diarrhea at all while you were over there?
A. Yes, sir.

Q. What kind of treatment did you get?
A. I got full bags of IV fluid.

Q. Where did you get this?
A. It was in Nasariyah from the 15th MEU up at the university.

Q. Was it Lieutenant Commander (b)(6) that gave it to you?
A. No, sir.

Q. Do you recall who gave it to you?
A. A corpsman with the 15th MEU.

Q. Do you know what his name was?
A. No, sir.

Q. Okay. So again, going forward in time, during the dragging episode, do you recall any officers being present?
A. I know at some point Major Froiter and Major Paulus walked up, but I don't know exactly when.

Q. Do you recall them saying anything?
A. No, sir.

Q. Okay. Okay. So where was (b)(6) left?
A. In the middle of the exercise yard.

Q. This was outside. Right?
A. Correct, sir.

Q. Was the sun overhead or was he in the shade?
A. He was just in the sun a little bit, sir.

Q. And you can't recall what the temperature was at this time?
A. It was hot but that covers a lot of ground out there.

Q. Which is your definition of hot? Can you give us a range?
A. Probably 95 plus.

Q. Okay. So he's left. He's put out there, what happens next?
A. He's given water. He's put out there with water and he's pretty much left there.

Q. Did you see him drink any water at this time?
A. No, sir.

Q. What was he doing?
A. Just kind of laying there, sir.

Q. What do you mean by laying there?
A. He was lying down. He didn't get up. I just remember him laying out there.

Q. Did anyone try to talk to him at all?
A. I don't remember, sir.

Q. Do you recall if he was saying anything?
A. He was moaning some, sir, but I don't recall anything that sounded like words.

Q. Just mumbling?

DO: That's a, yes, sergeant?

WIT: Yes, sir.

Questions by the prosecution:

Q. Did you see him receive in medical care?

A. I saw HM 3 (b)(6) give him a quick vital sign check. Everything appeared to do be in normal range.

Q. Did you hear (b)(6) tell anybody that?

A. I asked him what he was doing and he said he was okay. That may not be the exact words, but that's the meaning.

Q. Did you observe any conversation between (b)(6) and Major Paulus?

A. Yes, sir.

Q. What did you hear?

A. I was in a spot where I could see them talking, sir.

Q. How long were you watching (b)(6) during this conversation?

A. Probably 20, 25 feet away, sir.

Q. How long after the dragging incident stopped, did this conversation take place?

A. I would say probably 20 to 30 minutes, sir.

Q. Okay. So up to that point in time, we got the conversation with (b)(6) when's your next observation of (b)(6)

A. I believe it's about 2330. They woke me up and I forget who I had to go talk to about what, but (b)(6) was laying next to the fence with his legs -- I think it was his left leg on the ground, and his right leg crossed over his left leg.

Q. Okay. Was he laying on his backside?

A. On his back.

Q. On his back. When you say his legs were crossed, what do you mean?
A. Okay. Like think, sir it's opposite I can't get my right leg to do this but --

Q. Did he have his knee up?
A. Yes, sir.

Q. So he --
A. Kind of like this.

Q. So his left leg up with his right leg crossed in a shape of a number four?
A. Yes, sir.

Q. Now -- okay. So that's what you see. Anything else that you heard?
A. He was making noise. It wasn't words. It was incoherent noise.

Q. What do you mean?
A. Moaning and groaning, sir.

Q. What was he doing with his hands? Could you see?
A. I don't remember, sir.

Q. Were you told or did you observe any further defecation incident?
A. I was told about another incident which happened two or three hours previously.

Q. Okay. Do you recall who told you that?
A. No. I do not.

Q. Do you -- could you smell anything?
A. No, sir.

Q. All right. Anything else significant?
A. No, sir.

DO: Any time you're ready for a break, you just tell us.

WIT: Yes, sir.

DO: Off the record.

The deposition recessed.

DO: The time is 1321.

Questions by the prosecution:

Q. When we left off --

CC[MR. HIGGINS]: It's 1221. Excuse me.

DO: Wrong addition on my watch.

Questions by the prosecution:

Q. Where we left off is talking about your observations of (b)(6) around 2230, thereabouts. At that time, was (b)(6) provided any type of medical care?

A. Not at that time, sir.

Q. Did you have any knowledge whether medical care was going to be provided for him at that time?

A. I had no knowledge either way, sir.

Q. Did you see anybody that was giving him an IV?

A. No, sir.

Q. Other than (b)(6) did you observe any other corpsman or doc or et cetera, check out (b)(6)?

A. No, sir.

CC[MR. HIGGINS]: I object to et cetera.

Questions by the prosecution:

Q. Were you ever advised as to why (b)(6) was a prisoner there at the detention facility?

A. Yes, sir, I was.

Q. What were you told?

DC[CAPT FOLK]: I'd object to hearsay.

DO: You can go ahead and answer it, sergeant.

WIT: I was told he was involved in an ambush of 507th and that he took a truck and dragged the body of an American through the streets. He also took a rifle off of the 507th and had it buried and submerged in the river, and he was selling it to the other prisoners that were brought in with him.

Q. Okay. Where did you learn this information?
A. From the HET Team.

Q. Let's talk about that. When did you speak to the HET Team members?
A. When they came to interrogate him on the morning that I first saw him.

Q. So when you spoke to him later that, that you --
A. Before they went in and interrogated him.

Q. Okay. So you spoke to the HET Team members prior to the interrogation?
A. Yes, sir.

Q. Can you recall what time of day that was?
A. Probably 1030 to 1100.

Q. Okay. Did you speak to the HET Team members after the interrogation?
A. Yes, sir.

Q. Did he indicate to you whether he thought (b)(6) was a source of intelligence?
A. They said they haven't been able to get any information from him.

Q. Did you know what the plan was for (b)(6) at that point?
A. No, sir. I assumed he was going to go down to, I think it was Bazra because they had a good prison camp at the time. Be sent to that.

Q. Why?
A. Because he was a Baath Party member, and he had the involvement with a 507 ambush.

Q. Okay. You weren't -- were you present during the actual interrogation?
A. I was present on the compound, but I was not present at the interrogation itself.

Q. Okay. All right. I'm going to shift gears on you a little bit. Now, I want to talk about Sergeant Pittman. All right?
A. Yes, sir.

Q. Did you ever observe Sergeant Pittman strike a detainee?
A. Yes, sir.

Q. Who?
A. I do not remember names of the detainees.

Q. And during what period of time did you observe this?
A. That night, and I believe the next night when he brought the prisoners into the compounds.

Q. What did you observe him do?
A. I observed him kneeling prisoners in the stomach, kneeling and punching in the soft tissue, and also kicking the outside of the knee.

Q. Did you ever observe him do that to (b)(6)?
A. No, sir.

CC.[MR. HIGGINS]: What day are you talking about.

Questions by the prosecution:

Q. Is this the first night you were in the camp?
A. Yes, sir.

Q. So is this the night you saw (b)(6) with the dragging incident or the night before?
A. The night of the dragging incident, sir.

Q. Okay. And then you said the next night?
A. Yes, sir.

Q. Okay. When you said you don't know who -- was it just random prisoners?
A. When they were brought the camp, sir. When they were first brought into the camp, they were searched and worked over, if I can use that. They were worked over a little bit upon initial entry into the camp?

Q. What do you mean, "worked over"?
A. Like I was describing with the knee strikes and the fist to the abdomen.

Q. What was the purpose of this?
A. To make them more compliant with the orders from the guards.

Q. Did it appear to you that they were not being compliant?
A. No, sir.

Q. Did it appear that these strikes were retribution?
A. No, sir.

Q. Then, why do you to be more compliant? What do you mean?

A. To ensure there would be no future resistance.

Q. Wouldn't it appear that the detainees were resisting at the time?

A. No, sir.

DC[CAPT FOLK]: What was the answer?

TC: No.

Questions by the prosecution:

Q. If they were resisting, and wanting to comply, and using them to enforce compliance, then what's the purpose of striking them? Do you know?

CC[MR. HIGGINS]: Objection. Calls for speculation.

DC[CAPT FOLK]: Same objection.

DO: You can answer, if you can sergeant.

WIT: It's the same answers as I said before. Just to ensure future compliance.

Questions by the prosecution:

Q. Okay. All right. Let's talk about the strikes. You said strikes to the soft tissue, what do you mean by the soft tissue?

A. I was told that it was because they would leave a mark. Like the soft tissue of the abdomen. I was told by Sergeant Pittman, that wouldn't leave a mark on them.

Q. Okay. Well, can you specifically recollect in your mind a time that you saw Sergeant Pittman strike somebody in the stomach?

A. Yes. We had some new prisoners come in, and it was at night and they had the prisoners strip all their clothes off. They searched the clothes, gave a cavity search of

the prisoners, and Sergeant Pittman was yelling at them, and then did a knee to the abdominal region.

Q. Let me stop you there. A knee to the abdominal region of the prisoner?

A. Yes, sir.

Q. What did the prisoner do?

A. Doubled over.

Q. How would you gauge range, one being barely grazing, ten being enough to break, if it would have been bone to bone contact?

A. Five.

Q. Fife?

A. Yes, sir.

Q. Okay. So you just described the knee to the stomach. What else?

A. Also, punches to the stomach.

Q. So you said the prisoners doubled over and then a punch?

A. Yes, sir.

Q. What would the prisoner do?

A. Usually fall to the ground at this point.

Q. Now, that was Sergeant Pittman that did that?

A. Yes, sir. Sergeant Pittman, Sergeant (b)(6) and Lance Corporal (b)(6)

Q. Were any of these strikes -- okay. Let me back up a minute. Do you recall a (b)(6) coming to the camp?

A. Yes, sir.

Q. Did you observe any strikes on the (b)(6)

A. Yes, sir.

Q. By who?

A. Sergeant Pittman and Lance Corporal (b)(6)

Q. What kind of strikes?

A. The same as I was describing.

Q. Is this is a person you were recollecting?

A. No, sir.

Q. Was this a different prisoner?
A. Yes, sir.

Q. Let's talk specifically about the (b)(6) Where did you see Sergeant Pittman strike the (b)(6)
A. In the stomach, sir.

Q. With what?
A. I believe it was a knee, sir.

Q. What was the sheik's reaction?
A. He fell to the ground.

Q. And what did the -- when the (b)(6) fell to the ground, was he making any noise?
A. He was kind of crying in pain -- not crying, but you could tell he was in pain.

Q. What was the (b)(6) doing prior to being struck in that manner?
A. He originally had been brought to the camp and directed to give him special treatment. So there was an old bathroom, so we set one of those up to put him in there, you know, secure and everything, and then we were told no special treatment so he was brought back from there, and that's when he was beaten.

Q. Okay. So he was -- okay. You used the word "beaten" but where did that occur?
A. Back in the -- the buildings ran like this.

Q. So one of the holding cells?
A. In this holding cell, in the back.

TC: The witness just drew on the table with his fingers a rectangle, and then he drew two lines to indicate three separate holding buildings, and pointing?

WIT: This is a passageway, and this is the other. The (b)(6) was in this room.

TC: You described the three rooms, and then the room that was on his, using his left hand, which was on his far left, is the room he said the (b)(6) was in at the time.

Questions by the prosecution:

Q. Okay. Forgive me if I asked this question, but what was the (b)(6) doing prior to the strike?

A. He was kind of standing there asking why.

Q. Was he provoking?

A. No.

Q. Was he making any type of aggressive gesture toward Sergeant Pittman or anyone else?

A. Not that I saw, sir.

Q. How about the other prisoner that you saw Sergeant Pittman strike?

A. I did not see any aggressive gestures by the prisoners, sir.

Q. Did you observe him strike anybody else?

A. I observed, other than this (b)(6) a couple of prisoners. I don't remember exactly how many it was. I think it was two.

Q. What kind of strikes did you observe?

A. The abdominal strike with fist and knee and the kicks to the outside of the knee.

Q. This is Sergeant Pittman?

A. Yes.

Q. Okay. Let's go back to the (b)(6) other than the knee that you saw Sergeant Pittman give to the (b)(6) any other strikes by Sergeant Pittman?

A. Not that I recall, sir.

Q. Any other strikes by the Marines that were with Sergeant Pittman?

A. Yes, sir.

Q. What?

A. Punches to the stomach.

Q. Who was doing the punches to the stomach?

A. I do not remember, sir.

- Q. Can you give me -- if it's not Sergeant Pittman, what's the other possible people that it could have been?
- A. I believe, it would have probably been Lance Corporal (b)(6).
- Q. Did you see Sergeant (b)(6) hit anybody?
- A. Not that I remember, sir.
- Q. Let's talk about Sergeant Pittman's role there at the camp, or at the facility. What was his function?
- A. He was a guard at the facility.
- Q. Okay. He was a guard, but what -- did he have any type of leadership billet?
- A. Not that I recall, sir.
- Q. Okay. What was his position in relation to Lance Corporal (b)(6)?
- A. He was a sergeant and Lance Corporal (b)(6) was a lance corporal. I don't think they were even on the same shift.
- Q. Well, how was it, if you know, that these two are together with the (b)(6)?
- A. Because I saw them.
- Q. But you don't know why that were with the (b)(6)?
- A. Let me go back to finish answering that question.
- Q. Okay.
- A. Because initially, when this (b)(6) was brought in, we had instructions to give him special handling, and then once that instructions were changed, they brought the (b)(6) into the holding cell and from what I understood, it was pretty typical how the prisoners were treated. They were give all the different strikes to make sure the future submission, and then he was left there. He asked for some water. He asked for prayer beads, so those were returned to him.
- Q. Okay. When you say "special treatment" what do you mean?
- A. He was isolated from the rest of the prisoners. The -- because here's the cell, and over here, there was some old bathrooms, and he was held over here by himself with one guard, just to ensure that he didn't get away.

TC: Okay. The witness is just again using the table. He indicated with his finger the rectangle that he would have drawn earlier to indicate the holding cells and then off on below it on the left he indicated with his hand, which would be this other holding facility?

WIT: Other structure, sir.

Questions by the prosecution:

Q. Um, all right. Other than Lance Corporal (b)(6) Sergeant (b)(6), sergeant Pittman, and yourself being there when this was going on, was there anybody else there?

A. I do not remember, sir.

Q. Was any -- was Major Paulus or Major (b)(6) there?

A. No, sir.

Q. Was Staff Sergeant (b)(6) there?

A. I'm not sure. I just don't remember.

Q. Okay. Did you make any reports to anybody what you saw?

A. After the first time I saw it I talked to Staff Sergeant (b)(6), and he was kind of like, well, that's what we have to do to manage the people who came in. I didn't know anyone else to go to at that point.

Q. Did you ever mention anything to Major (b)(6) or Major Paulus about what you saw?

A. I don't remember, sir.

Q. Okay. Let's go back just for a moment and talk about episode, from the time that you saw (b)(6) left, where he was left, after the individual drug him out until the time you saw (b)(6) again right around 2330, did you see Major Paulus at any time during that time frame?

A. Yes, sir.

Q. What did you see him doing?

A. I saw him walking and talking to Major (b)(6). I believe he came and talked to me too, but --

Q. What time frame was this?

A. In -- probably about 17, 1800, just before sunset.

Q. Where was this?

A. Same general area.

Q. In fact, there were a lot of Marines who had diarrhea?
A. Yes, sir.

Q. All right. In your interactions, your dealings with (b)(6) did he ever express any concern for his well being?
A. Who, sir?

Q. (b)(6) did he ever convey to you that he was sick?
A. Request for water, no.

Q. Did he ever tell you that he was injured?
A. No, sir.

Q. Did he ever tell you that he was in any type of pain whatsoever?
A. No, sir.

Q. Did you have the opportunity to do that if you wanted to?
A. Yes, sir.

Q. Did you have the occasion to observe Major Paulus tour the facility?
A. Yes, sir.

Q. What were your observations of how Major Paulus was running the detention facility?
A. I thought it was a big improvement because of the way it had been down.

Q. What do you base that off of?
A. He implemented more concertina wire in the holding pens. He arranged for regular showers for the prisoners, since they were kind of random, when they could talk to the CB's and they are bringing the shower truck over.

Q. He improved discipline among the Marines over there?
A. [In audible response.]

Q. Okay. When you were suffering from diarrhea, did you see a corpsman or a doctor?
A. A corpsman.

Q. Do you remember who that corpsman was?
A. No. I do not.

Q. All right. Did you interact with several other detainees at this facility?

A. Yes, sir.

Q. Did any of them, at any time, ever approach you and --

TC: I object to relevance and hearsay.

Questions by the defense (Capt Jasper):

Q. Noted. You can answer, sergeant. Did anybody ever express -- any of Iraqi detainees ever express

(b)(6) condition?

A. No, sir.

DC[CAPT JASPER]: That's all I have, thank you.

DC[CAPT FOLK]: Could I request five minutes?

DO: Absolutely. We'll recess, the time is 1245.

The deposition recessed.

DC[CAPT FOLK]: The time is 1259. Captain, I have one more issue to bring up, I'm going to hand to you what's been previously marked as DE-A for identification, and I'm going to show the prosecutor a copy of this document.

TC: Okay. Have the court reporter mark it the next deposition exhibit in order.

The court reporter marked the exhibit.

DC[CAPT JASPER]: I'm also going to show defense counsel here, Captain Folk, one page written by an unknown person at this point.

CC[MR. HIGGINS]: At least unknown to us. I hope somebody knows.

DC[CAPT JASPER]: Now handing Defense Exhibit A for identification to Sergeant (b)(6)

Questions by the defense (Capt Jasper):

Q. Sergeant (b)(6) do you recognize this document.

A. Yes, sir.

Q. Do you recall when you wrote this document?
A. I believe it was the day after (b)(6) died. That's the statement that I've prepared at the request of Major Paulus.

Q. Is there any additional pages to this document or --
A. There are additional pages, I do not know where they are.

Q. Who did you provide this statement to?
A. Major Paulus asked for statements.

Q. Is everything in the statement true and accurate?

TC: Can I take a look at this.

DO: I'm sorry. Pick those up. I think there's a pending question, why don't you restate that.

DC[CAPT JASPER]: We withdraw that question, sir, thank you.

DC[CAPT FOLK]: Before we go any further, I'd just asked that we run some copies of that, and I would like a couple of minutes to go over that document.

CC[MR. HIGGINS]: We're not -- we were just trying to identify what this document was. We're not offering it as testimony or part of the testimony or exhibit in the court-martial for impeachment for. We're not offering this for any evidentiary purpose other than to try to figure out who wrote it.

WIT: I wrote it, sir.

DC[CAPT JASPER]: Thank you. I have no further questions.

DO: And I'm just going assume that we'll take another recess so you can look at this document.

We're off the record, the time is 1304.

The deposition recessed.

DO: Let's go back on the record. The time is 1309.

CC[MR. HIGGINS]: By agreements of the parties, the last exhibit in order is not offered as evidence of any kind, and this is merely done for identification purposes and will

only be include as an exhibit for that reason, and I believe that's the understanding of both trial counsel and Sergeant Pittman's defense counsel, Captain Folk.

DC[CAPT FOLK]: That's correct, sir.

DO: Major Francis.

TC: Yes, sir.

DO: All right. Captain Folk?

DC[CAPT JASPER]: I don't have anymore questions. Thank you Sergeant Hennagin.

CROSS-EXAMINATION

Questions by the defense (Capt Folk):

Q. Sergeant (b)(6), I have a couple questions for you that don't have anything to do with what you testified to today. I received a packet of documents from the government labeled Grant of Testimonial Immunity and order to testify, and some other things along those lines. Those documents are addressed to you as Sergeant John M. (b)(6) maybe I'm just confused, but are you still in the Marine Corps as a sergeant or are you now medically retired?

A. I'm medically retired.

Q. So when they say Sergeant (b)(6), that's incorrect. They should say Mr. (b)(6). Right?

A. Yes, sir.

Q. Are you -- again I may have missed this, are you testifying today pursuant to that grant of immunity or --

A. I would have testified any way, sir.

Q. But essentially, you are no longer subject to orders by anyone in the Marine Corps as a result of being retired medically; is that correct?

A. It must be called by --

Q. Check. Your first day at Camp Whitehorse, as a Translator was 5 June 2003; is that correct?

A. I'm not sure, sir. I kind of lost track out in the

desert.

Q. I think you testified earlier that --

A. It was a 4th or probably the 5th.

Q. I think what you testified was that you arrived on June 4th and worked from 10 to 1800, then went back to get your gear?

A. [Inaudible response.]

Q. Is that -- can you give an audible answer. Does that sound correct?

A. Yes, sir.

Q. You were assigned to work as a translator to provide the service from the Marines working as guards at the camp. Correct?

A. Yes, sir.

Q. You had no duties that related to performing the indoctrination -- I'm sorry, the in-processing phase of detainees?

A. Yes, sir. They requested me to translate a couple of times.

Q. But you never put hands on detainees at the in-processing portion?

A. No, sir.

Q. Your involvement in the in-processing period then based on your first being sometime around June 4th, and your exposure would have started on 5 June?

A. Yes, sir.

Q. When you testified that your understanding of that in-processing period, delivering some of these strikes and blows that you described. When you described that purpose of that would be to ensure compliance of that with orders that would have been what you were told by the people at the detainee facility at Camp Whitehorse?

A. Yes, sir.

Q. So your opinion is based on hearsay or second-hand knowledge you gained from other Marines?

A. Yes, sir.

Q. You were never told -- well, strike that question.

Now, you testified earlier that the only strikes you ever saw delivered Marines to detainees was during this in-processing phase of the detainee cycle, for lack of a better word; is that correct?

A. Yes, sir.

Q. And that would obviously include these strikes you saw delivered to these individuals?

A. Yes, sir.

Q. Where did this in-processing of the (b)(6) take place?

A. When he was actually in-processed to the facility, he was in-processed in the same cell block that (b)(6) had been in.

Q. Where the excrements was pulled and all those other things?

A. Yes, sir.

Q. And the Marines that were assigned to this included Sergeant Pittman?

A. I do not know, I was not present for it.

Q. Maybe I'm confused then. You said all the blows you saw, administered -- all these strikes that were administered was during in-processing?

A. Yes, sir.

Q. Was the with the exception of the (b)(6) then?

A. He was not officially in-processed to begin with because he was getting special treatment. When that special treatment ended, then he was in-processed as the other prisoners.

Q. When did you first come in contact with the (b)(6)?

A. The first day he was there, I don't remember the exact day.

Q. Do you recall if it with the day of the (b)(6) excrement incident?

A. I believe it was the next day, sir.

Q. So your belief is that the (b)(6) showed up the day after --

A. Yes, sir.

Q. And upon the sheik's arrival at the detention facility, when did you first come in contact with him?

A. As soon as he arrived, sir.

Q. Do you know why?

A. Because they wanted somebody who could speak Arabic to talk to him and try and tell him that he -- and just talk to him and try to communicate with him where he was going, and why he was going.

Q. So you were kind of his bridge to the Marines that were assigned there?

A. Yes, sir.

Q. And who ordered you to act in that capacity? Who informed you that that was going to be your duties?

A. Staff Sergeant (b)(6) I believe. At this point, I don't remember for sure.

Q. And do you recall what time on that day after the (b)(6) incident that -- what time of the day it was that you first came in contact with the (b)(6)? Morning? Afternoon? Evening?

A. Afternoon, sir.

Q. And at this time, your understanding was that he was not supposed to be in-processed because he was supposed to receive what you called "special treatment"?

A. Yes, sir.

Q. And Staff Sergeant (b)(6) told you that this (b)(6) needed this special treatment?

A. Yes, sir. He said he had been ordered to give special treatment by the -- the order originated with the battalion commander.

Q. When did his status as needing special treatment change to him not needing special treatment?

A. I think he had been there two or three hours, and then it changed.

Q. Who gave you the order?

A. We were just told -- again, it was probably Staff Sergeant (b)(6) but I can not state this with certainty, sir.

Q. Were you with the (b)(6) for that entire period?

A. No, sir.

Q. I'm sorry?
A. No, sir.

Q. Do you know who was with the (b)(6) for that period -- or the three-hour period?
A. I don't remember, sir. I know there was always someone up there.

Q. When you say "up there," what do you mean?
A. Did you get to see the drawing I made, sir? The other cells -- not the other cells, but --

Q. Where the HET Team was conducting the interrogations?
A. Yes, sir.

Q. Which I believe on the diagram is the lower left-hand corner.

TC: I think it is Deposition Exhibit 5.

Q. So the (b)(6) was kept for these two or three hours in that interrogation room?
A. Yes, sir. There were actually two buildings, side by side. The one closest was not -- it didn't even get cleaned up. They just -- he stayed in the interrogation room, and the one on the other side from the holding facility was cleaned up for the (b)(6).

Q. You're not aware of what was taking place in regard to if (b)(6)?
A. No, sir.

Q. What were you doing here?
A. Probably reading or playing chess or trying to get some rest, sir.

Q. When did you become involved again with the (b)(6) then on that day following, after he arrived?
A. When they pulled him back in for in-processing for special treatment.

Q. What was your understanding of why the special treatment was needed?
A. Because Marines had been shot at in the city he was from. I don't remember what city he was from.

- Q. And again, you said it was Staff Sergeant (b)(6) who told you that this special treatment was ending?
- A. I believe so, sir. Like I said before, I can not state that with certainty.
- Q. It sounds, then would you agree that it sounds like the (b)(6) was almost being punished?
- A. Yes, sir. That was how I think all of us felt about it, that this (b)(6) was being punished because people supposedly loyal to him was attacking Marines.
- Q. What instructions were given regarding what was going to be done to the (b)(6) following the time that this special treatment was ending?
- A. He was supposed to be put in with the general population.
- Q. What instructions were given regarding the in-processing of the (b)(6)?
- A. He said we were told he should get the same as any other prisoner, he was no longer special.
- Q. And who was that message delivered by that the (b)(6) was no longer special?
- A. I'm not sure. I believe it was Staff Sergeant (b)(6), but again, for certainty, I can't say, sir.
- Q. What happened after this knew order or word came out regarding the change in the (b)(6) status?
- A. The (b)(6) was taken to where (b)(6) had been, he had the punches, knees to the stomach, and the knee kicks delivered just like any other prisoner.
- Q. Now, you had been there at this point, maybe 1 or 2 days?
- A. Yes, sir.
- Q. So when you say you like any other prisoner, you're basing that on what you were told about how in-processing was to other prisoners?
- A. Yes, sir.

Q. So basing that on essentially -- okay. Um, bottom line is you're not basing it on what you observed up to that point?

A. Correct, sir.

Q. Okay. Who, if you could name for me everybody that was present when the (b)(6) was in-processed in that holding cell?

A. Myself, I believe Staff Sergeant (b)(6) was there, but I can't speak of that for certainty, Sergeant Pittman, and I believe it was Lance Corporal (b)(6) as well, sir.

Q. And how long did this in-processing take place?

A. Three to five minutes at most.

Q. Was he strip searched during that time period?

A. Yes, he was, sir.

Q. Do you remember if any items were found on him, weapons of that nature?

A. Nothing was found on him.

Q. Did you at any point stop the in-processing?

A. No, I did not, sir.

Q. And based on your memory, Staff Sergeant (b)(6) would have been the highest ranking Marine present during this in-processing of the (b)(6).

A. Yes, sir.

Q. And after Staff Sergeant (b)(6) the three highest ranking Marines would have been you, Sergeant (b)(6) and Sergeant Pittman?

A. Yes, sir.

Q. What was Staff Sergeant (b)(6) doing during this in-processing of the (b)(6)?

A. I can not remember, sir.

Q. And you said that the only contact you observed between Sergeant Pittman and the (b)(6) was that Sergeant Pittman touched the today (b)(6) with his knee on one occasion; is that correct?

A. Yes, sir.

Q. And this was during the period of time when the sheik's clothes were being removed for the strip search, and he was having his legs spread apart, and doing all the things that they require in-processing teams to do?

A. Yes, sir.

Q. And you were present for the duration of this strip search of the (b)(6)

A. Yes, sir.

Q. And the duration of the in-processing?

A. Yes, sir.

Q. Are you aware of whether the sheik's information was entered in the logbook by Staff Sergeant (b)(6) at the conclusion of the in-processing?

A. I believe so, but I don't remember.

Q. Do you recall which knee -- I'm sorry. Do you recall which side of the (b)(6)'s body you saw Sergeant Pittman come in contact with?

A. From the left side of the (b)(6)'s body.

Q. The left side of the (b)(6)'s body? And you said you believe Lance Corporal (b)(6) was also present, but you were not sure?

A. Yes, sir.

Q. Are you sure it was Sergeant (b)(6) or are you not sure about that, him also being present?

A. I do not remember seeing Sergeant (b)(6) there at all.

Q. So the only two people you knew were Sergeant Pittman and Lance Corporal (b)(6), and yourself and Staff Sergeant (b)(6)?

A. Yes, sir.

Q. So you don't remember seeing Sergeant (b)(6) there during any portion of the in-processing of the (b)(6)?

A. No, sir, I do not.

Q. And is it your memory that Sergeant Pittman was present for the complete duration of this in-processing of the (b)(6)?

A. Yes, sir.

Q. What happened to the (b)(6) following the time he was in-processed and placed and they clothed him?
A. The in-processing ended and he was allowed to put his clothes back on.

Q. Where did he go at that point?
A. He stayed there at this holding facility.

Q. Was he ever turned over to the general population per Staff Sergeant (b)(6) instructions?
A. No, sir. He was always kept isolated.

Q. Was that because of his high profile status?
A. I believe it was because of his religious status.

Q. When did the (b)(6) leave Camp Whitehorse?
A. The next day, I believe, sir.

Q. Were you present when the (b)(6) left?
A. I do not recall, sir.

Q. So you don't remember seeing the (b)(6) leave?
A. No, I didn't, sir.

Q. And I guess, you said the (b)(6) left the following day, that would be two days after the (b)(6) excrement incident and --
A. That would probably be the 7th of June, sir.

Q. Did you have any conversations with the (b)(6) following this in-processing?
A. A little bit, sir.

Q. What was the subject matter of the discussion with the (b)(6)?
A. It was small talk, pretty much.

Q. He didn't request any kind of medical assistance?
A. No, sir.

Q. He didn't request any kind of special treatment?
A. No, sir. I believe he requested his prayer beads, but --

Q. You don't recall for sure?
A. No, sir.

- Q. How many in-processings at Camp Whitehorse did you personally witness while you were stationed there?
A. Probably about five, sir.
- Q. Starting on that 5th of June, following after that?
A. Yes, sir.
- Q. The other in-processings that you witness, would have taken place in the outside portion of the facility that was barbed wire?
A. Yes, sir. They were -- if -- do you still have the -- if you look at -- usually this section, sir, which is the patio. Kind of a step that runs all the way around in this area.

DC[CAPT FOLK]: The witness is indicating the area in front of the two squares marked prisoners. When I say in front, I mean south of.

CC[MR. HIGGINS]: Bottom of the page.

DC[CAPT FOLK]: Yeah, bottom of the page.

Questions by the defense (Capt Folk):

- Q. This conversation you had with Staff Sergeant (b)(6) about how in-processing was conducted, when did that take place?
A. That's the first time I saw.
- Q. And you speak to him because you thought it was a physical kind of situation?
A. I thought it was a violation of the Geneva Convention, sir.
- Q. And Staff Sergeant (b)(6) said this is how we do business?
A. Pretty much, sir.
- Q. Where did you receive your training on the Geneva Convention?
A. Just basic, what we were taught in recruit training.
- Q. You never received any specialized or addition training following boot camp?
A. No, sir.

Q. And you hadn't received any training on how to in-process detainees while you were at Camp Whitehorse?
A. No, sir.

Q. So that was -- okay. How much training would you say you received in boot camp about the Geneva Convention?
A. Enough to understand the basics tenants, such as, you can not -- you're not supposed to deny prisoners mail, clergy, medical attention. You're not supposed to hit them.

Q. So it's your understanding that detainees cannot be hit in any manner by prison guards or guards at a detainee facility?
A. Yes, sir.

Q. And your opinion is based on your instruction you received in boot camp?
A. Yes, sir.

Q. No other instruction?
A. I believe we had a class or two at 1st Radio Battalion, but it was kind of all blurred together. I don't remember exactly, sir.

Q. So essentially, you went to Staff Sergeant (b)(6) because in your opinion, the way the in-processing was conducted was incorrect or improper?
A. Yes, sir.

Q. Based on your understandings of the Geneva Convention?
A. Yes, sir.

Q. And Staff Sergeant (b)(6) indicated to you this is the just the way it's done?
A. Just the way it has to be done.

Q. Did you ever take your concerns to any other Marines at Camp Whitehorse?
A. Sergeant Pittman and I had a long of discussion in the barracks later. I don't remember when, but probably later that day.

Q. Regarding how the in-processing was conducted?
A. Yes, and the treatment of prisoners.

Q. Did he make you aware as a federal correctional officer at that time?
A. Yes, he did, sir.

Q. Do you have any background in federal corrections?
A. No, sir.

Q. Had you ever been in an environment with detainees and prisoners such as those at Camp Whitehorse prior to arriving there?
A. No, sir.

Q. When you arrived at Camp Whitehorse, were you aware that violent felons were being kept there?
A. Not when I arrived.

Q. You weren't aware that there were Iraqis detained there that had murdered other Iraqis.
A. Not when I first arrived there.

Q. You became aware of that later?
A. Shortly after I arrived. I was not aware of it at the time that I arrived there, sir.

Q. Did that change your opinion at all about how the in-processing was conducted?
A. No, sir.

Q. Did you provide any translation during any of the in-processing that you actually observed?
A. I would tell people to stand up, sir.

Q. Did the prisoners and detainees comply with your instruction?
A. Yes, sir.

Q. Was (b)(6) the only person you ran across that didn't follow your orders in Arabic?
A. Yes, sir.

Q. Let's talk about (b)(6) for one more second. You acquired some information about (b)(6) from the HET Team, I believe you've already testified about to Major (b)(6) regarding these things?
A. Yes, sir.

Q. And you had also learned from the HET Team that (b)(6) had been worked over, I think was the term used, prior to the time he came to Camp Whitehorse?

TC: Object to hearsay on that one.

DO: You can answer it.

WIT: That's why I believe they were going to talk to him again later, and they said that he never said that so --

Questions by the defense (Capt Folk):

Q. Well, do you remember being told by HET that (b)(6) had been worked over before coming to Camp Whitehorse?

A. Yes, sir.

Q. You were told that by members of the HET Team?

A. That is my belief, sir.

Q. Is that your memory?

A. That is my memory, sir.

Q. When you went back and talked to HET a second time, did they deny telling you that, was this after (b)(6) was dead?

A. No, sir.

Q. Was this prior to his death?

A. Yes, sir.

Q. When?

A. The same day he was interviewed by HET, I talked to them about it again.

Q. So the first time you talked to them about (b)(6) was that they said he had been worked over before he was in the confinement facility?

A. Yes, sir.

Q. And the second time many you talked to them, they denied ever saying that?

A. Yes, sir.

Q. You remember making a statement to NCIS back in June 2003? The 13th of June?

A. I remember making a statement. I do not know of the date.

Q. Do you remember making a statement though where you swore that everything in the statement was the truth to the best of your recollection?

A. Yes, sir.

Q. And you hand wrote that statement out to the NCIS agent that was there?

TC: I just want to make sure my objection is clear. I just object to the whole hearsay nature of the questioning.

Questions by the defense (Capt Folk):

Q. Do you remember making that statement to them?

A. I don't remember making that statement to them at this time. At that time, it was a verbal statement when they came and questioned me. The earlier statement was a request from us by Major Paulus, and I provided that earlier statement. NCIS may have had that, but --

Q. Did you go to Kuwait City and make a statement?

A. Yes, sir.

Q. Was that committed to writing?

A. Yes, sir.

Q. Was that written by you or agent?

A. By me, sir.

Q. And you said everything's the truth?

A. Yes, sir.

Q. And in that statement, you also discussed the learning from HET that (b)(6) had been worked over by Iraqi Nationals. Correct?

A. Correct, sir.

Q. And in that statement, however, you did not mention that HET later denied working him over. Right?

A. Yes, sir.

Q. And was that because they didn't believe HET the second time?

A. I just didn't mention it, sir. I probably didn't even think about it.

Q. But you did think about that fact that they told you he had been worked over before he was detained. Correct?
A. Um, hm.

Q. Is that a yes?
A. I'd actually like to examine the statement myself.

DC[CAPT FOLK]: Let me give you a copy of it right here.

The statement was given to the witness.

DC[CAPT FOLK]: Sir, for clarify, I would like to make a copy and make it the next exhibit in order, if you want to.

DO: Why don't we see where we go from here, and entirely up to the counsel.

Questions by the defense (Captain Folk):

Q. You just had a second to inspect this thing. This is a document to showed you who made a statement to Kuwait City?

A. Yes, sir. When I gave -- when I wrote up the statement, I spoke with the NCIS Agent, (b)(6) and I told him that I wasn't sure that I heard it from them or not, but he said he wanted this statement included at the end.

CC[MR. HIGGINS]: Include a copy of the exhibit.

DO: It's entirely up to counsel. So far what I've seen, basically now, making a ruling to these. He's refreshed his recollection so --

Questions by the defense (Capt Folk):

Q. And it's your testimony that -- well --
A. I'm not sure exactly when I spoke to HET. Again, it may have all been the same day, it may have been quite a bit later. I do know that I spoke to them --

Q. A second time?
A. Right.

Q. And they denied it the second time?
A. But I --

Q. Don't recall when the second conversation was?
A. Correct, sir.

Q. Okay. You do recall the first conversation you had with HET when they told you that (b)(6) had been worked over prior to coming to Camp Whitehorse. It was around the time that he was getting interrogated that first --
A. Yes, sir.

Q. Okay. Do you remember specifically the name of the individual of the HET Team who denied telling you he had been worked over?
A. Staff sergeant (b)(6).

Q. I'm sorry?
A. Staff Sergeant (b)(6).

Q. Is that (b)(6)?
A. Yes, it is, sir.

TC: Excuse me, was that the person who told you they had been worked over or told you that they had not been worked over?

WIT: He told me he had not been worked over.

Questions by the defense (Capt Folk):

Q. Mr. (b)(6) if you could just tell me to the best of your recollection, who the HET members were that were assigned to Camp Whitehorse following the time you arrived?

A. There were no permanent assignments.

Q. Okay. Who do you recall -- who was present from HET while you were there?

A. Every member at some point came out there while I was there, sir.

Q. Okay. What were the names of the individuals that you recall?

A. Sergeant (b)(6). Sergeant -- or Staff Sergeant -- I don't remember his name. His first name is (b)(6).

CC[MR. HIGGINS]: Let's take a break.

DO: Captain, is this a good place to take a break?

DC[CAPT FOLK]: Yes, sir.

DO: Let's take our break. The time is 1341.

The deposition recessed.

DO: Let's go back on the record. The time is 1404.

Captain Folk.

Questions by the defense (Capt Folk):

Q. I may be -- you partially answered the question that we ended with. But I asked you to identify all the names of the HET Team that you could remember that you came into contact with at Camp Whitehorse, and you've given the name Staff Sergeant (b)(6). Sergeant (b)(6) and then we took a recess?

A. Staff sergeant (b)(6) -- I had it just a minute ago too. I don't remember the other name, sir.

Q. Do you remember the name of the individual from the HET Team that told you on that day that (b)(6) was being interrogated, that he had been worked over prior arriving at the camp. Do you remember the individual who told you that?

A. No. I do not, sir.

Q. Sergeant, in your statement, you gave to Major Paulus, that I think we talked about with you a few minutes ago, this two-page statement, is this the only other statement you made other than that sworn statement I showed you from NCIS?

A. Yes, sir.

Q. When did your time at Camp Whitehorse end?

A. I was down in Kuwait for another -- I'm not even sure. I don't remember. Probably another thing just to verify that the statements, and then I came back up and the camp had been -- the POW portion of the camp had been distained, so at that point I went back to the HET Team.

Q. Had you been attached to a HET Team prior to your arrival at Camp Whitehorse?

A. I had actually been attach to the S-2. Prior to that I was attached to HET 17.

Q. And HET 17, what unit -- what was your parent unit they

were attached to?

A. I believe it was 2d Intelligence Battalion.

Q. Was that attached to RTC-7 or do you recall?

A. They were attached to Task Force Tarawa.

Q. Okay. During the time you were attached to the HET teams, were you able to observe the interrogations of various detainees?

A. A couple of times, sir.

TC: Object to relevance.

Q. During your observations of the interrogations of various detainees, did you see the HET Team members, did you see any physical force with the people they were interrogating?

A. No, sir.

Q. Did -- do you know what the basis for the interrogations were of these people. Meaning, were they former military members, former military, Iraqi military, or members of the Baath Party, do you recall?

A. Yes, to both.

Q. And do you recall where those interviews that you witnessed, where they happened?

A. The interviews I witnessed were in Numania with HET 16, and they were conducted -- there was always an initial interrogation just to get basic information about the person. Once the basic information was received from the individuals, it was determined if further interrogation was needed. Who needed further here, who needed to be sent down to the cam at Bazrah [ph].

Q. The interrogations that you witnessed, were they the initial interrogations or were they the follow-on interrogations that you just described?

A. Both, sir.

DO: Do you want to take a break, sergeant?

WIT: Yes, sir.

DO: That's fine.. We're off the record.

The deposition recessed.

DO: Going back on the order. The time is 1432.

Captain Lieutenant.

DC[CAPT FOLK]: Yes, sir.

Questions by the defense (Capt Folk):

Q. Just a few more. The total number of Iraqis that you saw in-processed into Camp Whitehorse was -- did you testify it was approximately five?

A. Yes, sir. But I will give you no certainty with that number.

Q. Somewhere in the ball park of five?

A. Yes, sir.

Q. And all physical contact that you witnessed between Marine guards at the Whitehorse facility, and the Iraqi detainees took place during this in-processing period?

A. Yes, sir.

Q. Now, you mentioned that when you observed the (b)(6) being in-processed, one of the Marines there -- well, the Marines there were Staff Sergeant (b)(6) yourself, Sergeant Pittman, and Lance Corporal (b)(6) Correct?

A. Correct, sir.

Q. Now, how did you know Lance Corporal (b)(6)

A. I met him out there and --

Q. And was he -- how often would you see him?

A. About once or twice a day.

Q. Is he somebody that you would consider you worked close to professionally at Camp Whitehorse? How would you describe your relationship with him?

A. I'm not sure. I wouldn't call and say close, it's just I mean, we were we all had a forced closeness there. We got along pretty well. We'd talk about things, things that came up.

Q. And have you had any contact with him since your time returning to the continental United States?

A. No, sir.

Q. No?

A. No, sir.

DC[CAPT FOLK]: All right. Sergeant, I don't have any other questions. Thank you very much?

TC: Redirect.

REDIRECT EXAMINATION

Questions by the prosecution:

Q. He asked you about some conversation you had with Sergeant Pittman after you observed these strikes by Sergeant Pittman of these EPW's in which you were talking about how the EPW's should be treated. Do you recall that question?

A. Yes, sir.

Q. Tell me exactly what was said by Sergeant Pittman during that conversation, to the best of your recollection?

DC[CAPT FOLK]: Objection to relevance?

WIT: He was explaining to me how they received new prisoners at, I believe, it's Reicher's Island he said, where he's a federal prison guard. And if you gave the impression -- this is how they handled new inmates at Reicher's Island as well because you have to let them know who's in control otherwise they'll just run all over you.

Q. How is this conversation prompted?

A. I believe I said I talked to him about this not being the way the things are supposed to be handled.

Q. And in his response, were there any further conversation on the issue?

A. We discussed it back and forth for probably close to an hour.

Q. Were you debated the point?

A. Yes.

Q. Okay. Well, tell me what's being said back and forth?
A. He was making his case for having treated people this way, he said they stay in line and they don't cause problems. I was making my case based on my understanding of Geneva Convention, and how people are -- prisoners of war are supposed to be treated.

Q. What was his reaction to when you started mentioning Geneva Convention?

A. I don't remember, sir. It stayed a very friendly conversation. There were no yelling back and forth or anything like that.

Q. Did he indicate whether he had any awareness of the Geneva Convention?

A. He did not either way, sir.

Q. Why did you feel what you observed in his conduct or the rest of the Marines conduct with the prisoners violated Geneva?

A. Because in my memory of what I had learned in the Geneva Convention --

CC[MR. HIGGINS]: Objection. Vague as to "other Marines".

Q. Other Marines being Lance Corporal (b)(6) and -- just Sergeant Pittman and Lance Corporal (b)(6)?

A. Because my understanding of what I knew of -- and still know, I don't know anymore about the Geneva Convention is that prisoners were not supposed to be mishandled or mistreated.

Q. What did you feel was mistreatment?

A. Striking a prisoner who did not appear to be giving any resistance, I considered mistreatment.

Q. And that's what you observed?

A. Yes, sir.

Q. Okay. Now, at the time that you saw the strikes on the (b)(6) by Sergeant Pittman, was he flexcuffed at the time? The (b)(6)

A. I don't remember.

Q. Do you recall if he was sandbagged?
A. I don't recall that either, sir. I don't remember.

Q. Do you recall if he was dressed or not?
A. He was dressed, sir.

Q.. Was he struck at all when he was naked?
A. I do not believe so, sir.

Q. So did the strikes happen prior to the strip search or after the strip search.

DC[CAPT FOLK]: I'm going to object to characterization -- this witness has testified that Sergeant Pittman on one single occasion strike the (b)(6) and if we're referring to strikes, I want the record to reflect by whom the strikes were being --

TC: All right.

Questions by the prosecution:

Q. So just on one occasion you saw Sergeant Pittman strike the (b)(6)
A. Yes, sir.

Q.. Now, was he then kneed as you described?
A. Yes, sir.

Q. Okay. Was that before or after the strip search?
A. Before, sir.

Q. How about the strikes by Lance Corporal (b)(6) Those before or after?
A. They were all before, sir.

Q. Now, on this other individual that you were talking about earlier that you saw Sergeant Pittman strike, was that individual flexycuffed at the time?
A. No, sir.

Q. Was there a sandbag on his head?
A. No, sir.

Q.. Was he dressed?
A. Yes, sir.

Q. He was naked?

A. Both, sir.

Q. What do you mean by both?

A. He was both dressed and naked.

Q. Okay. So explain what you're talking about there?

A. He was struck while wearing clothes, and then after he was stripped for the search, he was struck while he was naked.

Q. Do you still have that diagram?

DC[CAPT FOLK]: Handing to Major Francis, Deposition Exhibit 5.

Q. Now, before I move away from having the (b)(6) and this other individual who saw Sergeant Pittman strike, on either occasion, with these two individuals, did you see either of those individuals provoke or in any other way, in your opinion, justified the strikes that were being laid upon them?

A. No, sir.

DC[CAPT FOLK]: What was the answer? I'm sorry.

WIT: No, sir.

Questions by the prosecution:

Q. Okay. Now, this diagram, Deposition Exhibit 5, you've drawn that earlier, and I just want to make sure that we keep that in relation to what your testimony was earlier. If you could just mark with a pen with an "H" where it was that you (b)(6) when you helped -- actually, make an H1 where you saw (b)(6) at the time that he was with Lance Corporal (b)(6).

A. Which time?

Q. The time that you helped him up. And then draw an H2 on the place you took him on that occasion, (b)(6)

A. [The witness did as directed.]

Q. Can you please mark with an H3 where you saw (b)(6) the time he had defecated himself.

A. [The witness did as directed.]

- Q. Then mark with an H4 where you saw (b)(6) when he was placed out in the holding pen.
A. [The witness did as directed.]
- Q. And mark with an H5 where you saw (b)(6) roughly at 2330 as you testified earlier to.
A. [The witness did as directed.]
- Q. Okay. Now, if you mark with an "S" the place where you saw the (b)(6) being struck by Lance Corporal (b)(6) and Sergeant Pittman?

CC[MR. HIGGINS]: Objection. If this document is going to be used in the trial of Major Paulus, which it may be, any references to the (b)(6) would be irrelevant to this case.

Questions by the prosecution:

- Q. Now, with all those markings as you made them, and as you've drawn the diagram, is that a fair and accurate depiction of how the detention facility looked on June 5th, 6th, or 7th 2003, as you've testified?
A. To scale? No, sir. But in relationships, yes, sir.
- Q. So is it a fair and accurate depiction?
A. Yes, sir.

DC[CAPT FOLK]: You might want to pass that around.

Questions by the prosecution:

- Q. Okay. Now I want to just touch on a couple of things with (b)(6). In your statement that you gave to NCIS on 13 June, you made indication that, and I'm quoting here "337's flexycuffs were cut off his hands," and then in parenthesis you put "Approximately 1500). What were you referring to at that time when you made that statement?
A. I'm not sure. May I review the context?

CC[MR. HIGGINS]: Objection foundation.

Questions by the prosecution:

- Q.. Before I hand that to you, let me ask a couple more questions here. Based on the question I just asked you, is there anything that could look at that could potentially refresh your recollection?

CC[MR. HIGGINS]: As to what he meant in a document that he's going to read to refresh his recollection.

TC: Correct.

CC[MR. HIGGINS]: I think there's a foundation problem with that. Objection.

Questions by the prosecution:

Q. Do you recall making that -- writing that phrase in your statement to NCIS?

A. No, sir. I don't.

Q. You don't?

A. I'm pretty sure that it's a time reference though.

Q. Is there anything that could help refresh your recollection?

A. No, sir.

Q. So reading your own statement wouldn't help you refresh your recollection as to what you meant by it.

A. That's why I want to read the context. If I --

Q. Let me just ask you this, do you recall at any time seeing (b)(6) with flexycuffs on his wrists?

A. Yes, sir.

Q. Okay. Tell me what was the situation that you saw the flexycuffs on his wrists?

A. The first time I saw him, he had flexycuffs on his wrists in that outside holding pen.

Q. Is this when he was waiting to speak to HET?

A. Yes, sir.

Q. Now, after he spoke to HET, did he still have them on his hands?

A. I believe so, sir, but I do not remember exactly.

Q. Do you remember if he still had the sandbag on his head?

A. No. I don't, sir.

Q. Do you recall a conversation that you had with HM-2 (b)(6) after (b)(6) was found dead?

A. Yes, sir. I remember asking him what he thought the cause of death was.

Q. What were you told at that time?

CC[MR. HIGGINS]: Objection. Hearsay.

WIT: I was told -- I asked him if he thought it was a heart attack and --

CC[MR. HIGGINS]: Objection. Hearsay.

WIT: He said probably. I put one other thing down there, a heart attack or a stroke.

Q. Is that something that you were supposing as a possible cause of death or did you learn that from somebody?

A. I was just supposing that it was a possible cause of death.

DC[CAPT FOLK]: If I could just quickly. I have the same hearsay objections to these prior statements, just to --

DO: That's fine. So noted.

Questions by the prosecution:

Q. One more thing I want to ask you, you said you didn't remember who told you from the HET Team that he had been worked over by them, but yet you remember someone telling you that. Correct?

A. Yes, sir.

Q. Was there some indication on (b)(6) part that he had been worked over by someone?

A. Not to my knowledge, sir.

Q. Tell me why it was that you put that in your statement that (b)(6) had been -- that you had learn that HET had possibly worked over (b)(6)? Why did you put this in the statement?

DC[CAPT FOLK]: Objection. Relevance?

WIT: Because when he talked to the NCIS agent, he wanted me to include it in the statement. I wasn't sure whether I had heard it HET or not.

DC[CAPT FOLK]: Objection. Relevance.

WIT: Because I was talking to the NCIS agent and I happened to mention that going through.

Questions by the prosecution:

Q. Why did you mention it?

A. Because I thought it might be relevant to the investigation.

Q. Did the NCIS agents at that time tell you what type of injuries (b)(6) had suffered?

A. No, sir.

Q. At that time, why -- what did you feel -- what did you believe was (b)(6) cause of death?

CC[MR. HIGGINS]: Objection. Calls for speculation.

Q. Okay. If you thought it was an illness, why mention to the NCIS agent about HET and their potential treatment of (b)(6)?

A. Because -- give me a minute to think about it, just because I thought the illness may have been brought on by getting worked over by somebody.

Q. But was there anything, thinking going back to your observations of (b)(6), other than the defecation and other observations of the moaning that you described later in the night, is there anything that made you believe he was suffering from any kind of illness?

A. No, sir.

Q. Um, I want to go back also when you had the conversation with him about his age, (b)(6) age. What was -- I know we touched on this a bit. When he was talking about his age, what was the tone of his voice?

A. Just responsive -- not let me not say responsive, but it was just pretty flat answering tone.

Q. What was the level of the volume of his voice?

A. Pretty quiet.

Q. What do you mean by pretty quiet?

A. It was a little difficult to hear.

Q. Was he laying down at the time?

A. Yes, sir.

TC: Okay. That's all I have.

RECROSS-EXAMINATION

Questions by the defense (Capt Jasper):

- Q. Do you know who Staff Sergeant (b)(6) is?
A. No. That's Staff Sergeant -- I just remember the first name -- I just remembered his last name as well, it's (b)(6)
- Q. And this HET Team at Camp Whitehorse consisted of (b)(6)
A. (b)(6)
- Q. Sergeant (b)(6) and Staff Sergeant (b)(6)
A. Yes. There were other members, but I do not remember their names right now.
- Q. How many more members consisted of the HET team at Camp Whitehorse?
A. Three. They were not at Whitehorse. They where are in the city linked to the COC.
- Q. Do you know which HET Team informed you that (b)(6) was worked over before arriving at Camp Whitehorse?
A. I thought I heard it from HET 17.
- Q. And HET 17 was comprised of who?
A. The same individuals.
- Q. So it had to be one of those three individuals who informed you that (b)(6) --
A. One of those six individuals.
- Q. All right. I'm going to shift directions on you here. The last time you saw (b)(6) laying in the rec-yard was around 2330, late at night?
A. Yes, sir.
- Q. Do you remember approaching him and telling him to be quiet?
A. I did tell him to be quiet.

Q. And you told him to be quiet because you thought his moaning was from -- because he was uncomfortable being in confinement or being captive vice from being in some type of pain?

A. Yes, sir.

DC[CAPT JASPER]: Thank you.

DO: Not that you have to have anywhere questions, Captain Folk, but if you do.

DC[CAPT FOLK]: I actually just have one.

Q. On these other occasions that you testified about, where you witnessed the in-processing process maybe five other times, what other Marines were present for that in-processing besides yourself and Sergeant Pittman?

A. Lance Corporal (b)(6), Sergeant (b)(6), and I don't remember who else.

Q. Do you recall if there were any other Marines with some kind of command authority, such as Staff Sergeant (b)(6) or anybody else?

A. I'm not sure if Staff Sergeant (b)(6) was there the entire time, but he was there.

Q. How about any officers? Do you remember if there were any officers?

A. No. There were no officers present.

DC: Thank you, sergeant.

DO: Does any counsel be request the witness be warned or subject to recall? The latter might not be -- we should give stipulation to his presence to testify.

DC[CAPT JASPER]: No, sir.

TC: No, sir.

DO: No warning?

DC[CAPT FOLK]: I would ask that he be warned. I expect every witness to be warned not to discuss their testimony.

DO: Sergeant, please don't discuss your testimony with anyone other than government counsel or defense counsel.

CC[MR. HIGGINS]: Or civilian attorney.

DO: Of course. You're free to return about your business. We want to thank you for attending, I know it was a great effort for you. That concludes the deposition.

The deposition adjourned.

AUTHENTICATION OF DEPOSITION

in the case of

Major C. A. Paulus and Sergeant G. P. Pittman, U.S.
Marine Corps, 2d Battalion, 25th Marines, Reserve Unit, Garden
Grove, New York.

Pursuant to R.C.M. 1104(a)(2)(B), the deposition in the foregoing
case is authenticated by the trial counsel due to the deposition
officer's return to reserve status.

L. J. FRANCIS
Major, U.S. Marine Corps Reserve
Trial Counsel

UNITED STATES MARINE CORPS
MARINE CORPS BASE
BOX 555010
CAMP PENDLETON, CALIFORNIA 92055-5010

IN THE MATTER OF)
)
UNITED STATES)
)
v.)
) GRANT OF TESTIMONIAL IMMUNITY
PAULUS. CLARKE A.)
)
(b)(6))
Major)
USMC)

To: Sergeant (b)(6) USMCR


1. It appears that you are a material witness for the Government in the case of United States v. Major Clarke A. Paulus, USMC, for the following alleged violations of the Uniform Code of Military Justice, to wit: Article 92, willful dereliction of duty; Article 93, cruelty and maltreatment; and Article 128, assault.

2. In consideration of your testimony as a witness in the matters described in paragraph (1), you are hereby granted immunity from the use of your testimony or other information given by you (including any evidence directly or indirectly derived from your testimony or from other information you provide) against you in a criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with an order to testify in this matter.

3. It is understood that this grant of immunity from the use of your testimony or other information given by you (including any evidence directly or indirectly derived from such testimony or other information you provide) against you in any criminal case is effective only upon the condition that you testify under oath as a witness in the matters described in paragraph (1).

4. This grant of testimonial immunity is made under the authority granted me under Rule for Courts-Martial 704, Manual for Courts-Martial, 2002 Edition, as a General Court-Martial Convening Authority.

Dated: 11 MAY 2004


W. G. BOWDON
Major General
U.S. Marine Corps
Commanding

DEA EXHIBIT 1
APPELLATE COURT XYU
HANNICAN
PAGE 73 OF 85

UNITED STATES MARINE CORPS
MARINE CORPS BASE
BOX 555010
CAMP PENDLETON, CALIFORNIA 92055-5010

IN THE MATTER OF)

UNITED STATES)

v.)

PAULUS, CLARKE A.)

(b)(6)
Major
USMC)

ORDER TO TESTIFY

To: Sergeant (b)(6) USMCR


1. As an officer empowered to convene general courts-martial and pursuant to Rule for Courts-Martial (RCM) 704, I hereby make the following findings:

a. That Sergeant (b)(6) USMCR, possesses information relevant to the pending trial by general court-martial of Major Clarke A. Paulus, USMC, and that the presentation of his testimony at this trial is necessary to the public interest; and

b. That it is likely that Sergeant (b)(6) USMCR, would refuse to testify on the basis of his privilege against self-incrimination if subpoenaed to appear as a witness.

2. On the basis of these facts, I hereby order Sergeant (b)(6) USMCR, to appear and testify before the general court-martial convened for the trial of Major Clarke A. Paulus, USMC. In accordance with RCM 704, no testimony or other information given by Sergeant (b)(6) USMCR, (or any information directly or indirectly derived from such testimony or other information) can be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply.

Dated: 11 MAY 2004


W. S. BOWDON
Major General
U.S. Marine Corps
Commanding

APPELLATE EXHIBIT XXV

PAGE 74 OF 85

DEPT EXHIBIT 2

HANNIGAN



UNITED STATES MARINE CORPS
MARINE CORPS BASE
BOX 555010
CAMP PENDLETON, CALIFORNIA 92055-5010

IN REPLY REFER TO:
5800
SJA

11 MAY 2004

From: Commanding General
To: Colonel D. L. Applegate (b)(6) USMCR
Subj: ORDER FOR ORAL DEPOSITIONS ICO UNITED STATES V. MAJOR CLARKE A. PAULUS
(b)(6) USMC AND UNITED STATES V. SERGEANT GARY P. PITTMAN
(b)(6) USMCR
Ref: (a) RCM 702, MCM (2002 Ed.)

1. Per the reference, you are hereby appointed as the deposition officer in the subject cases. The Marines to be deposed are as follows:

- a. Major (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- b. Sergeant (b)(6) USMCR residing at (b)(6)
(b)(6)
- c. Sergeant (b)(6) USMCR attached to
2d Battalion, 25th Marines, (b)(6)
- d. Hospitalman Second-Class (b)(6) USNR residing at
(b)(6)
- e. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- f. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- g. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- h. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- i. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)
- j. Lance Corporal (b)(6) USMCR attached to 2d
Battalion, 25th Marines, (b)(6)

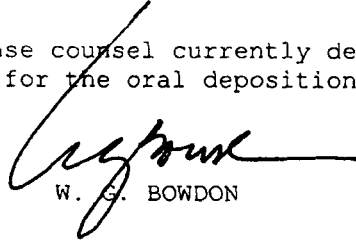
2. This action is necessary because these Marines and one Sailor may become material witnesses in the subject cases and their testimony preserved should it become necessary. These depositions should be completed no later than 10

Xxv
APPELLATE EXHIBIT ~~DEP. EXHIBIT~~ 2 (PERR)
74 OF 85 PROSECUTION (b)(6) (ENK)

Subj: ORDER FOR ORAL DEPOSITIONS ICO UNITED STATES V. MAJOR CLARKE A. PAULUS
(b)(6) USMC AND UNITED STATES V. SERGEANT GARY P. PITTMAN
USMCR

June 2004. If additional time is necessary, submit a written request for an extension. The depositions will be recorded by a court reporter for further use in court-martial proceedings.

3. By copy hereof, trial and defense counsel currently detailed in the subject cases will remain detailed for the oral depositions.


W. G. BOWDON

Copy to:
TC (Maj Francis)
DC (Capt Jasper/Capt Folk)
SJA, 1stMarDiv (Rear)

on the arrival of (b)(6), he refused to follow or acknowledge basic commands, whether given in Arabic or English. EPW (b)(6) would lie on the floor, occasionally moaning or rolling over. When the prisoners were given food and water, he was given food and water with the others. On the morning of June 5, he was placed in the outdoor holding pen while the other prisoners went to the exercise yard, because of the difficulty in obtaining his cooperation. That day, I attempted to communicate with him in both English and Arabic, but the only thing that was communicated was his desire for water. I refilled his water approximately 3 times, and watched him drink in excess amounts of water. When it was time to return him to the main detainment area, many repetitions of commands to get up were given to him, but he made no attempt to rise, which he did after great effort. He then walked back inside the facility, where he again collapsed to the floor. Later the same day, he was found on the floor of cell, covered in his own excrement. I again attempted to order him to stand, but he completely refused to comply with any instructions. The guards were ordered to remove his clothes and drag him out into the exercise yards. One of the other detainees cleaned him, while several others cleaned the holding cell. As he refused to stand, At this time, HM3 (b)(6) examined him and stated that he was okay. (b)(6) was remained in the exercise yard because he would not respond to commands, and was supplied with water immediately and food at approximately 2300. Later at XXV (b)(6) EXHIBIT (12). I was called to communicate with another detainee (b)(6) and saw (b)(6) lying and heard him moaning. At approximately 80 of 85

0001

(b)(6)

the Corps. to

I enlisted

on, I was
United States Marine Corps on May 6, 1996. I am currently assigned
the Enemy Prisoner of War Detainment Facility at Camp Whitehorse,
Iraq with 2nd Battalion, 25th Marine Regiment. I make this
statement of my own free will, without threats or promises of any

In the morning of June 4, 2003, I was dropped off at the Enemy Prisoner of
Detainment Facility (EPW facility) for my first experience working there. At this
time, not knowing if this was a permanent transfer to the EPW facility, I had
moved my gear to the EPW facility. On this date, I worked from 1000
to 1800, at which point I returned to the 2nd Battalion, 25th Marine
Regiment (2/25) Combat Operations Center (COC). The following morning,
June 5, I arrived at the EPW facility with all my gear at approximately
0600.

My first interaction with EPW (b)(6) was shortly after my arrival. On the
morning of June 5. At the time I observed (b)(6) it struck me as odd
he was not standing, as all new detainees were required to do, flexi-
cuffed and with a sand bag over his head. He was lying on the floor
with his sand bag off but flexicuffs on his wrists, bound behind his
back while two other new detainees were standing there as they were
expected to be until the Human Exploitation Team (HET) had an opportu-
nity to question them. Being puzzled by this, I asked one of the guards
why (b)(6) was lying on the floor and I was told that he had just
fallen when he was placed into the EPW facility, and that he had fallen into
concertina wire when he flopped, but it appeared that he broke his fall.
The next time I saw (b)(6) he was being pulled to his feet with a
sand bag replaced on his head to be led out to the interrogation room
to be questioned by members of HET 17. The Marine who took him to
the room had the sandbag pulled tight over (b)(6) head and face, with the
material from the sandbag wrapped around his fist at the
back of (b)(6) neck, steering (b)(6) where he needed to go. After
approximately 15 to 20 minutes, (b)(6) was returned in the same manner
- he was taken by the same Marine who took him to the
interrogation facility and returned him to the same cells. When the HET
ended their questioning for the day, they said that (b)(6) was a

EXHIBIT (6)

1 of 5/2/13 June 03

REFUGEE STATUS

XXV

PAGE 81 OF 85

DR/6/13/03

uy, and that the two detainees brought in with (b)(6) (the Slim) were in the wrong place at the wrong time. The three of them were detained because they had knowledge of where a rifle from 507th engineers had been placed in the river. It turned out (b)(6) had taken the rifle from an American, and then sold it to

Slim Jims.

(1030-1100)

The next time I saw (b)(6) was in the holding pen outside Detachment Facility, laying on the ground. All the other detainees been placed in the exercise pen, on the opposite side of building, but (b)(6) had been placed by himself because of ongoing refusal to comply with orders from the Marine Corps. At this time, approximately 1030, SSgt (b)(6) told me to give about (b)(6) age, to which he told me 52. After that, I asked (b)(6) if he needed anything, so he told me he needed water. All this time, when 337 spoke to me, it was with a quiet voice that required great effort to hear. During period when (b)(6) was in the holding pen, he drank three liters of water, the detainees being given a 1.5 liter bottle full, so that (b)(6) consumed at least 2 liters of water. When I gave him the first bottle of water, I attempted to have him to receive it, but as he did not get up quickly, I handed it to him through the concertina wire. After (b)(6) finished the bottle of water, he asked to go back inside. I told 337 we would have to wait a short time while the other detainees had cleaning the holding areas. After the other prisoners been returned to the holding area, I ordered (b)(6) to get up. When he did not, I attempted to lift him by his armpits, but was unable to raise him. LCpl (b)(6) then came and ordered him to stand, and I helped and then (b)(6) slowly got to his feet with a groan. LCpl (b)(6) then guided him to the holding area, and I followed behind. As soon as he was back in the holding area, he flopped to the ground.

APPENDIX EXHIBIT

XIV

2 of 5/2/13 Jun 03

PAGE

82

OF

45

00

6/13/07

remained laying there. At this point I came to be of the opinion that it was mostly an act on (b)(6) part. I remembered when (b)(6) was in the outside holding pen, I would catch him staring intently at me, then as soon as he realized I was going back, he would close his eyes quickly. I felt like I was being studied. Before I left the immediate area of the holding, I mentioned to some of the other guards that I felt as if I was watching and observing, looking for a way to take advantage of us, and they agreed.

My next dealing with (b)(6) came after I was called (1500-1600) to assist, because he had defecated on himself. On coming back to the holding area, the first thing I noticed was the stench. I ordered him to get up and clean himself, to no avail. (b)(6) continued to lay there, his clothes soaked in his own excrement. In the room at the time were SSgt (b)(6), LCpl (b)(6), and LCpl (b)(6). I was told by Special Agent Reppard that LCpl (b)(6) was also present: attempting to order (b)(6) to get up and clean himself, LCpl (b)(6) and LCpl (b)(6) began to tear the robe and pants off (b)(6) throwing the soiled garments into a sand bag they could be burned. I believe at this time (b)(6) Flexi-fors were cut off his hands (approximately 1500). LCpl (b)(6) rolled (b)(6) around to remove his clothing. He resisted them a very little and made some small movements. When (b)(6) clothing was removed, I saw either Sg (b)(6) or LCpl (b)(6) drag him from the room. (I was told by Special Agent Reppard that it was LCpl (b)(6) who was dragged out of the room by his head, the Marine dragging (b)(6) cradling his head in one arm while the other maintained pressure on the top of (b)(6) head. (b)(6) was dragged out to the exercise yard, across cement in the building and down a 12 to 15 inch hole to the dirt of the exercise yard. (b)(6) was placed in the hole of the exercise yard, and the Slim-Tims were brought

3 & 5/2/13 Jun 03

APPELLATE EXHIBIT XIV

PAGE 83 OF 85

DN // 6/13/03

clean him up. They were given two water cans (5 gallon
ty), blue plastic bowls, and a brush. They were also
en gloves and some betadine solution, which they poured out.
ey began pouring water over (b)(6) while one scrubbed him
h a brush. (b)(6) assisted their efforts weakly, and continued
aining from time to time. 3 or 4 other detainees cleaned
cell during this time (500-1600). At this point (b)(6) was
t in the exercise yard naked.

Before seeing (b)(6) again, I learned that he defecated on
self another time, and that other detainees had been
ailed to clean him up once again. Also, SSgt (b)(6) showed me
air of pants he had obtained for (b)(6) and told me that
would put them on (b)(6) in the morning.

About 2330 that night, I was awakened to come talk to
other detainees for a reason I can't recall. At this time I observe
(b)(6) had moved in the exercise yard, closer to the
of the yard. He was laying on his back, with his
t knee up and his right foot crossed over his knee. 33
morning, so I told him to be quiet. (b)(6) did not
pond, and I went back to bed.

round 0030 on June 6 I was again awakened and told
f (b)(6) was dead. I came out to see (b)(6) laying on the
nd, and HM2 (b)(6) standing nearby. 4 of the detainees were
n awakened and told to move the body, but they were not
.. HM2 (b)(6) with the help of 3 Marines picked the body
and placed it on the concrete, where the awakened
ainees were instructed to wash it, which they did. After
body of (b)(6) was washed, it was placed in a body
add taken over by the holding pen to await pick-up in

4 & 5/2/13 Jun 03

APPENDIX C XXV
PAGE 84 OF 85 (102) 6/13/03

morning.

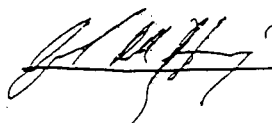
At 0600, the HMMWV came to get the corpse. SSgt Tello, Bly, myself, and one other Marine put the body in the back of the truck. I asked HM2 Bly if he thought 337 had died a heart attack, and he said that or a stroke.

Between 1500-1600 June 5, after 337 was dragged to the exercise area and had been cleaned up, HM3 Weekes examined 337 with aethoscope. I asked how 337 was doing, and HM3 Weekes said he was good (what I mean is 337 was conscious but very weak).

One thing from the HET I learned was that 337 was worked (meaning he had been beaten by them) before his detention by Iraqi nationals before his capture by U.S. military.

The only time I know of any detainees being struck by guards is during the indoctrination phase. The types of force used were punches and knees to the stomach and knees to the outside of the knees. The personnel involved were Pittman, Sgt Rodriguez, and LCPL Roy. However, I have no knowledge of any such blows being given to 337.

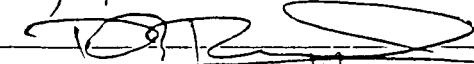
The above statement, consisting of five pages, was written by me, and is true and correct to the best of my recollections and beliefs. I have made and initialed corrections I wanted to make.



13 JUN 03
DATE

1842
TIME

Sworn and subscribed to before me on this 13TH day of June, 2003, at Kuwait City, Kuwait.


S/A D.B. REPPARD, NCIS

WIT: SECNAVINST 5520.30 of 4 JUN 93

5 of 5 / 2 / 13 JUN 03

APPELLATE DIVISION XIV

PAGE 85 OF 85

 6/13/03